Multiple sections of the *TRRO* include language that may be applicable to the parties' transition away from the reclassified UNEs to alternative arrangements Among them are provisions describing transition plans for each of the de-listed UNEs.[30] The *TRRO* also includes a provision entitled "Implementation of Unbundling Determinations"[31] These various provisions provided support for the different interpretations advocated by BellSouth and by the CLECs

ISSUES TO BE CONSIDERED

Legal Issues:

In support of its position, BellSouth pointed to the *TRRO* provisions that establish transition plans for the de-listed UNEs.[32] In describing the transition plans, the FCC specified that the plans apply only to the embedded customer base and do not permit CLECs to obtain New Adds.[33] Likewise, BellSouth referred to the Final Rules, which include similar language. BellSouth also relied on paragraph three of the *TRRO*, in which the FCC stated, "We believe that the impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry."[34] Section IX(A) of the *TRRO*, paragraph 235, provides that the requirements set forth in the *TRRO* shall take effect on March 11, 2005. Based on these provisions, BellSouth contended that it had no obligation to go through a change-of-law process with the CLECs regarding New Adds and that it had no duty to provide New Adds effective March 11, 2005

In contrast, the CLECs asserted that the parties must go through the change-of-law provisions of their interconnection agreements to implement the changes arising from the *TRRO*, including the elimination of New Adds for UNE-P and high capacity loop and transport They pointed to Section VIII(B), paragraph 233 of the *TRRO*, in which the FCC stated that it expected the parties to implement the *TRRO* findings as directed by section 252 of the Act. "Thus, carriers must implement

[30] *See TRRO*, ¶¶ 142-145, 195-198, 226-228
[31] *Id* at ¶¶ 233-234
[32] *See id* at ¶¶ 142-145, 195-198, 226-228
[33] *See id.* at ¶¶ 142, 195, 227
[34] *Id.* at ¶ 3

changes to their interconnection agreements consistent with our conclusions in this Order."[35] The FCC further specified that the ILECs and CLECs "must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule change."[36]

Technical and Administrative Issues:

In the *TRRO*, the FCC changed its impairment assessment of certain UNEs and modified its determination of whether ILECs were required to provide the UNEs, now de-listed, to the CLECs. To implement the changes, BellSouth would need to reprogram its system to reflect the new classifications, and the parties would have to cooperate in finding alternative service arrangements.[37]

According to BellSouth, the parties had nothing to negotiate regarding New Adds. "With all due respect, what is to negotiate? No new adds means no new adds."[38] BellSouth later acknowledged, however, that the CLECs and BellSouth disagreed about the *TRRO* provisions relating to the embedded base and what new orders the CLECs may place to serve the embedded base. "That is an issue that we have somewhat of a dispute on as well. . . . [W]e do have a disagreement on what the order and the rules mean with the 'new' there as well."[39]

The CLECs, in contrast, asserted that the termination of New Adds would not be a simple change as advocated by BellSouth but instead would affect many other issues, such as commingling and conversion.[40] According to the CLECs, for more than two years they have not been able to implement changes with BellSouth that were provided by the *TRO*.[41] For example, XO Communications Services, Inc. ("XO") contended that if BellSouth immediately terminated New Adds, before entering agreements with the CLECs covering commingling and conversion, the

[35] *TRRO*, ¶ 233
[36] *Id*
[37] *See, e g* , Transcript of April 4, 2005 Authority Conference ("April 4 Tr."), pp 22-23
[38] Transcript of March 14, 2005 Authority Conference ("March 14 Tr "), p. 102
[39] *Id.* at pp 130-131
[40] *See, e g* , Transcript of March 8, 2005 Status Conference ("March 8 Tr "), p 18, March 14 Tr , p 88, Transcript of March 28, 2005 Status Conference ("March 28 Tr "), p 34
[41] *Id*

CLECs would have few or no options for continuing some telecommunications services[42] thereby impeding what the FCC has called a "primary purpose of the Act - the promotion of facilities-based competition."[43] Likewise, the CLECs alleged the potential complications may frustrate the FCC's stated interest in a smooth transition, to the detriment of consumers.

Timing Issues:

The FCC released the *TRRO* on February 4, 2005. BellSouth, however, did not provide the CLECs with proposed language to incorporate the *TRRO* changes into the interconnection agreements until March 11 or possibly later.[44] Additionally, the language proposed by BellSouth did not address all changes associated with the de-listed UNEs. According to BellSouth, the language covered the transition period and migration for the embedded customer base but not the termination of New Adds.[45] "We don't even think we need to send an amendment that . . . takes out UNE-P or certain high-capacity loops and transport."[46]

The CLECs contended that BellSouth, in the past, had always taken the position that any change arising from an FCC order must be negotiated by the parties, no matter how clear the language.[47] For example, the CLECs pointed to the *TRO* changes that required ILECs to allow commingling and conversion The CLECs asserted that those provisions were very clear.[48] They claimed, however, that for more than two (2) years they had not been able to get those changes implemented with BellSouth.[49]

The CLECs asserted that BellSouth now should not be able to pick and choose the provisions of the *TRRO* that are favorable to BellSouth and implement those immediately without first

[42] March 8 Tr , pp 18-19
[43] *TRRO*, ¶ 52, *see also TRRO*, ¶ 2, March 8 Tr , p 18
[44] March 14 Tr., p 113, March 28, p 30-33.
[45] March 14 Tr , pp 115-116.
[46] *Id But see* Transcript of January 31, 2005 Authority Conference ("January 31 Tr."), pp 13, 17-18, 21, where, before release of the *TRRO*, BellSouth indicated that the changes would be implemented through the interconnection agreements
[47] March 14 Tr , pp 88, 109, 119, March 28 Tr , pp 33-34
[48] *Id.*
[49] *Id.*

implementing the *TRO* changes favorable to CLECs.[50] "There are a lot of issues underneath what could be seen as a pretty straightforward issue. . . . [W]e thought the commingling rule and the line conditioning rules were pretty darn clear "[51] The CLECs went on to say:

> [T]he *TRO* was clear in several respects. The *TRRO* has been clear. The FCC has clearly said before things like you must allow commingling, things like you must convert special access circuits to UNE. And Bell's position has always been – no matter how clear the change of law is, their position has been you've got to negotiate a change of law.[52]

The CLECs asserted that they had been "waiting for some of the good that has come out of the *TRO* for over two years. We can't get commingling. We can't get clear eligibility criteria. We can't . . . pick and choose . . . and we don't think it's appropriate that BellSouth does."[53]

FINDINGS AND CONCLUSIONS

The TRA is responsible for effectively governing and regulating utilities placed under its jurisdiction.[54] In so doing, the Authority must consider the consumers, the public good, and the overall landscape of the utility industries. With respect to the *Emergency Relief Petitions*, the TRA also was guided by the purpose and intent of Congress in enacting the Telecommunications Act and of the FCC in issuing its rules, including the *TRRO*.

The Telecommunications Act was designed to open local telecommunications service markets to competition, foster the deployment of advanced services, and reduce regulation.[55] Likewise, the *TRO* and *TRRO* encouraged and were predicated on continuing facilities-based competition. Through the *TRO*, the *Interim Rules Order*, and the *TRRO*, the FCC created a new world for the telecommunications industry. In the new world, New Adds are coming to an end

The *TRRO*, like the *TRO* and the *Interim Rules Order*, changed the landscape in which ILECs and CLECs compete and changed the law concerning the provision of UNEs. The FCC's orders,

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[50] *Id.*
[51] March 28 Tr , p 34
[52] March 14 Tr , p 109
[53] *Id* at 119
[54] Tenn Code Ann §§ 65-4-104 and -106 (2004)
[55] *TRO*, ¶3, *TRRO*, ¶ 1

together, set forth a plan for an orderly and reasoned transition away from certain UNEs within the industry This is an overarching tenet of the *TRRO*. The transition must be reasonable to ensure continuing service and choices for all customers.

The Authority took note of the FCC's statements of its purposes regarding the *TRRO*. "In this Order, the Commission takes additional steps to encourage the innovation and investment that come from facilities-based competition."[56] "Our unbundling rules are designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets "[57]

Additionally, the Authority noted that the FCC supported negotiations between ILECs and CLECs. "Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period."[58] Further, the FCC encouraged state commissions to monitor the transition and implementation process closely. "We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay."[59]

The *TRRO* language regarding the effective date of the New Adds change is not at all clear Utilities all across the country brought this issue before commissions and courts. The parties in this docket filed many of the resulting orders, and each side attempted to support its position by reference to various commission and court decisions. The inconsistencies within those orders, however, underscore the lack of clarity and the absence of a precise interpretation of the *TRRO* language

The TRA has a statutory obligation to promote competition and protect the interests of consumers.[60] The Authority must ensure that businesses and individuals continue to receive reliable

[56] *TRRO*, ¶ 2
[57] *Id.* at ¶ 3.
[58] *Id* at ¶¶ 145, 198, 228
[59] *Id* at ¶ 233
[60] Tenn. Code Ann §65-4-123 (2004).

telecommunication services and that any change among providers is handled in a stable, orderly manner. The TRA also has a duty to monitor closely the parties' implementation of the *TRRO* changes.[61] The questions before the TRA are when and how New Adds will end and what that will mean to companies and customers.

BellSouth initiated this docket and voluntarily brought these questions to the TRA. BellSouth asked the Authority to interpret the FCC's orders and then consider how to implement the changes.[62] According to BellSouth, the docket issues and proceedings would be similar to those considered by the TRA "all the time There's been a change. We argue about what the change means, and we talk about the process about how to implement that in interconnection agreements."[63]

According to the CLECs, an abrupt termination of New Adds would harm competition and consumers. If the switching, affected high capacity loops and transport were removed without provision for commingling and conversion, the CLECs would be at a great disadvantage and may not be able to satisfy their customers' needs. The CLECs had been entitled to commingling and conversion for more than two (2) years. The CLECs and BellSouth disagreed about why they had not yet implemented the changes.[64] The relevant point for consumers, however, was that the CLECs, without the ability to augment their network, would not have the tools they need as competitors in the new telecommunications world.

One goal of the *TRRO* was to encourage facilities-based competition. That aim would be frustrated by a hasty implementation of the New Adds change. Even facilities-based CLECs would be harmed if they lost access to New Adds before gaining the options of commingling and

[61] *TRRO*, ¶ 233
[62] Transcript of December 13, 2004 Authority Conference ("December 13 Tr."), p 78
[63] Transcript of January 10, 2005 Authority Conference ("January 10 Tr."), p. 43.
[64] *See, e g*, December 13 Tr, pp 70-72, 74; Transcript of January 31 Status Conference ("January 31 Tr."), pp 11-12, 16-17; March 8 Tr, pp. 15, 33-33; March 14 Tr, pp 114-117, 119, 128, March 28 Tr, pp 30-33

conversion. For example, XO, a facilities-based CLEC, asserted that it would encounter service problems from such a change [65]

BellSouth, in comparison, did not establish that it would suffer any harm by a continuance of New Adds if the continuance provided for a true up. In fact, BellSouth voluntarily extended its deadline for New Adds orders from March 11, 2005 to April 17, 2005, an extension of thirty-seven (37) days. BellSouth also conceded that BellSouth and the CLECs did not agree about the meaning of the "embedded base" and what qualified as service to the embedded base This clearly was an issue associated with New Adds; the CLECs may or may not be able to order certain services, based on whether or not BellSouth agreed that the order was for service to the embedded base. Certainly, BellSouth and the CLECs would need to negotiate and reach agreement on that issue before BellSouth started rejecting orders for de-listed UNEs.

The majority of the Panel[66] found that the public good and competition would not be served by an immediate implementation of the New Adds restriction. Rather, the CLECs and BellSouth should negotiate an appropriate implementation of both the *TRRO* New Adds change and the availability of commingling and conversion provided in the *TRO*. The Authority set an initial negotiation period of thirty (30) days.[67] The Authority encouraged both sides to negotiate expeditiously and in good faith. Although BellSouth must continue providing New Adds during the negotiation period, the New Adds orders placed on or after March 11, 2005 will be subject to a true up.[68]

[65] March 8 Tr , pp 18-19

[66] Director Kyle did not vote with the majority and instead moved that BellSouth's responsibility to continue furnishing UNEs exempted by the *TRRO* ended on March 11, 2005.

[67] This initial 30-day period is less than the extension BellSouth itself implemented by its carrier notification dated March 7, 2005.

[68] Through the true up, the parties will apply the agreed-upon rate retroactively to the New Adds orders placed on or after March 11, 2005

IT IS THEREFORE ORDERED THAT:

1. The *Emergency Relief Petitions* are granted to the extent they seek alternative relief and otherwise are denied.

2. BellSouth and the CLECs must negotiate (a) the rates, terms and conditions under which BellSouth will provide commingling and conversion, (b) the rates, terms and conditions under which the CLECs may order services currently provided as New Adds, and (c) the meaning of "embedded base" within the transition plans set forth in the *TRRO*.

3. The negotiations shall continue for thirty (30) calendar days, from April 11, 2005 through May 11, 2005.

4. During the negotiation period and until further notice from the Authority, BellSouth must continue to accept, and not reject, CLEC orders for New Adds

5. BellSouth must provide the New Adds according to the rates, terms and conditions established or otherwise referenced in the existing interconnection agreements between BellSouth and the CLECs. This includes any interconnection agreement under which BellSouth and a CLEC are operating, even if the agreement has expired.

6. The charges for New Adds placed on or after March 11, 2005 will be subject to a true up, back to March 11, 2005, in accordance with the transition plan negotiated between BellSouth and the CLECs for such services.

7. At the May 2, 2005 Status Conference, BellSouth and the CLECs must report on the progress of their negotiations. If the parties have not reached agreement on all issues (including the

provision of commingling and conversion) before the expiration of the thirty-day negotiation period, the parties must come back before the panel.[69]

8. The transition plans established in the *TRRO* for embedded customer bases shall apply to each CLEC's existing service for its embedded customer base unless or until the parties agree otherwise.

Deborah Taylor Tate, Director

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Sara Kyle, Director

Ron Jones, Director

[69] During the May 2, 2005 Status Conference, the parties agreed to extend the negotiation period until May 17, 2005, and to come before the panel during the Authority Conference scheduled on May 16, 2005

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 25, 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 TERMINATING ALTERNATIVE RELIEF GRANTED DURING APRIL 11, 2005 DELIBERATIONS

This matter came before Director Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket ("Panel"), at a regularly scheduled Authority Conference held on May 16, 2005. The Panel considered the status of negotiations among BellSouth Telecommunications, Inc. ("BellSouth") and the intervening parties ("CLECs")[1] on the petitions for emergency relief ("*Emergency Relief Petitions*")[2] previously filed by the CLECs in the docket.

BACKGROUND

On February 4, 2005, the Federal Communications Commission ("FCC") released the *Triennial Review Remand Order* ("*TRRO*")[3] Through the *TRRO*, the FCC reclassified certain

[1] As of May 16, 2005, the following had been granted intervention in the docket: Cinergy Communications Company, Competitive Carriers of the South, Inc.; KMC Telecom V, Inc , KMC Telecom III, LLC, MCImetro Access Transmission Services, Inc , NewSouth Communications Corporation, NuVox, Inc , NuVox Communications, Inc , Sprint Communications Company, L P , SprintCom, Inc d/b/a Sprint PCS, XO Communications Services, Inc , Xspedius Communications, LLC, Xspedius Management Co Switched Services, LLC and Xspedius Management Company of Chattanooga, LLC

[2] *See Motion for Emergency Relief* (February 25, 2005), *MCI's Motion For Expedited Relief Concerning UNE-P Orders* (March 2, 2005), *Cinergy Communications Company's Motion for Emergency Relief* (March 2, 2005)

[3] *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 FCC Rcd 2533 (February 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*")

unbundled network elements ("UNEs") and changed the obligation of incumbent local exchange carriers ("ILECs") to provide those UNEs to CLECs. The *TRRO* also set forth transition plans for the UNEs, which distinguished CLECs' ongoing service to their embedded customer bases from new orders for the de-listed UNEs ("New Adds").[4]

BellSouth and the CLECs (together, the "Parties") had opposing interpretations of the *TRRO* provisions. BellSouth took the position that the termination of New Adds was self-effectuating as of the effective date of the *TRRO* and that BellSouth therefore was not required to provide New Adds after March 10, 2005. In contrast, the CLECs asserted that the reclassification of UNEs was a change as contemplated by the change-of-law provisions in their interconnection agreements with BellSouth. These positions were set forth in the *Emergency Relief Petitions* and BellSouth's responsive filings. The Parties also presented oral argument before the Panel during the regularly scheduled Authority Conference held on March 14, 2005.

The Panel convened on April 11, 2005 to consider the *Emergency Relief Petitions*.[5] A majority of the Panel ("Majority")[6] ordered BellSouth and the CLECs to negotiate an appropriate implementation of both the *TRRO* provisions concerning de-listed UNEs and the availability of commingling and conversion provided in the *Triennial Review Order* ("*TRO*").[7] In addition, the Majority directed BellSouth to continue accepting and processing orders for New Adds until further notice from the Authority.

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[4] *TRRO*, ¶¶ 142-145, 195-198, 226-228

[5] *See* Transcript of Deliberations (April 11, 2005)

[6] Director Kyle did not vote with the Majority *See generally* Transcript of Deliberations (April 11, 2005)

[7] *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 FCC Rcd 16,978 (2003), *corrected by Errata*, 18 FCC Rcd 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*")

The Majority set an initial negotiation period of thirty (30) days, through May 11, 2005.[8] At that time, the TRA was scheduled to have an Authority Conference on May 2, 2005, before the expiration of the negotiation period. The TRA later cancelled the May 2, 2005 Authority Conference.[9]

The Hearing Officer conducted a status conference on May 2, 2005. The Parties reported that their negotiations had been unsuccessful and that they had a "fundamental disagreement" regarding some of the pending issues.[10] The Hearing Officer noted that the negotiation period was due to expire on May 11, 2005, five (5) days before the next regularly scheduled Authority Conference on May 16, 2005.[11] BellSouth agreed to extend the time during which it would continue accepting New Adds through May 16, 2005 to allow deliberations by the Panel at the May 16, 2005 Authority Conference.[12]

FINDINGS AND CONCLUSIONS

During the May 16, 2005 Authority Conference, the Majority of the Panel[13] noted that the negotiation period provided as alternative relief in the April 11, 2005 deliberations had expired. The Majority found that the negotiations between BellSouth and the CLECs had been unsuccessful and that further negotiations were not likely to yield results or agreement among the Parties.[14] The Majority therefore concluded that the alternative relief should not be extended and should end.[15]

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[8] *See* Transcript of Deliberations, pp. 9, 13-14 (April 11, 2005).
[9] *See* Transcript of Status Conference, pp. 3, 42-45 (May 2, 2005)
[10] *See Id* at 29-31
[11] *Id* at 3, 42-45
[12] *Id*
[13] Director Kyle did not vote with the majority but instead reiterated her position from the April 11, 2005 deliberations that the FCC expressly prohibited New Adds after March 11, 2005, that any agreement among the Parties regarding New Adds would be in contravention of the law, and that beginning on March 11, 2005 BellSouth has not been and is not required to furnish the de-listed UNEs
[14] Transcript of Authority Conference, pp 34, 36-37 (May 16, 2005)
[15] *Id* at 33, 35, 47

IT IS THEREFORE ORDERED THAT:

1. The alternative relief provided during the April 11, 2005 deliberations is terminated.

2. Effective 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.

Deborah Taylor Tate, Director

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Sara Kyle, Director

Ron Jones, Director

SBC, Sage Telecom Reach Wholesale Telecom Services Agreement

Nation's First Commercially Negotiated Agreement Ensures Healthy Phone Competition

San Antonio, Texas, April 3, 2004

SBC Communications and Sage Telecom today announced they have reached an historic seven-year commercial agreement for SBC to provide wholesale local phone services to Sage covering all 13 states comprising SBC's local phone territory. The agreement also contains provisions relating to data and internet services.

Sage Telecom is the third-largest competitive local exchange carrier in SBC's territory, serving more than one-half million local service customers.

This is the first such agreement between a Bell operating company and a local competitor in the four weeks since a federal court overturned wholesale rules imposed by the FCC late last year.

"This proves that when two companies are sincere about negotiating terms that are mutually acceptable, it can be quickly and smoothly," said Edward E. Whitacre Jr., Chairman and CEO of SBC.

"The real winners here are the customers of both companies, who will continue to benefit from choice in local servi provider," said Whitacre. "This demonstrates that the telecom marketplace can work."

Dennis M. Houlihan, Sage Telecom CEO, said, "Taking care of customers is our number one priority at Sage. We ar proud to have achieved a commercially reasonable agreement that enables us to expand on that priority."

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 contract is expected to be below $25.00 per line.

SBC has offered to negotiate comparable terms and conditions with any similarly-situated competitor.

This historic agreement comes on the heels of a move by the Federal Communications Commission to encourage telecom companies to negotiate commercially reasonable wholesale agreements among themselves.

"There is no reason in the world why we can't reach agreement with any other company that is equally willing to negotiate commercially reasonable terms," said Whitacre, who added that the company is in discussions now with numerous other wholesale carriers.

"We hope to achieve similar wholesale agreements with other local phone companies as we expand our business," added Houlihan. "Such an approach provides the certainty that our customers, employees and shareholders deserv

SBC Communications Inc. *(NYSE: SBC) is a Fortune 50 company whose subsidiaries, operating under the SBC brand, provide a full range of voice, data, networking, e-business, directory publishing and advertising, and relatec services to businesses, consumers and other telecommunications providers. SBC holds a 60 percent ownership inte in Cingular Wireless, which serves more than 24 million wireless customers. SBC companies provide high-speed DS Internet access lines to more American consumers than any other provider and are among the nation's leading providers of Internet services. SBC companies also now offer satellite TV service. Additional information about SBC SBC products and services is available at www.sbc.com.*

Founded in 1997, Sage Telecom provides local phone service to residential and small business customers primarily rural and suburban communities outside major metropolitan areas. The company, which has experienced explosive growth in recent years, is certified to provide local telephone service in eleven traditional Southwestern Bell, PacBe and Ameritech states. Providing innovative, lower cost alternatives to consumers and responsive customer service been key to the company's success.

Media Information

Press Releases View by Quarter

- 1st Quarter of 2006
- 4th Quarter of 2005
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- 1st Quarter of 2000

Qwest Press Release

June 01, 2004

View printable v

MCI and Qwest Reach Commercial Agreement for Wholes Services

First Commercially Negotiated Wholesale Agreement Between ILEC and Ma CLEC

ASHBURN, VA, and DENVER, May 31, 2004 — MCI, Inc. (MCIA.PK) and Qwest Communications International Inc. (NYSE: Q) today announced a landmark agreemer wholesale pricing and services that provides both carriers with certainty and stability time when the regulatory landscape is changing. The agreement marks the first time an incumbent local exchange carrier (ILEC) and a major competitive local exchange carrier (CLEC) have reached a commercially negotiated pact for local network access.

The MCI-Qwest agreement – reached after five weeks of mediated negotiations betwe the carriers – comes less than 90 days after the D.C. Circuit Court issued a decision vacating Federal Communications Commission (FCC) wholesale pricing rules. Today's agreement provides for both wholesale pricing continuity for MCI and a guarantee tha such services will continue to be available.

"This is a historic day for our industry. Qwest and MCI proved that two companies, th are direct competitors, can embrace the principals of a free-market economy and rea commercial services agreement that will allow them, together, to serve customers we said Richard C. Notebaert, Qwest chairman and chief executive officer. "While this agreement was forged without any regulatory assistance, we would like to thank FCC Chairman Michael Powell, for his continued support and encouragement to identify a solution to this complex industry issue."

"It has been MCI's position that good faith commercial negotiations can result in agreements that reflect the changing industry landscape and avoid complex regulator proceedings and litigation," said Michael D. Capellas, president and chief executive of of MCI. "This agreement proves that a negotiated outcome is not only possible, but mutually beneficial."

Good Faith Negotiations

Both companies expressed their commitment to good faith negotiations early in the process. In an April 1, 2004, letter to the FCC, MCI's Capellas endorsed carrier-to-car negotiations and the concept of a suitable mediator, as long as negotiations were conducted openly and transparently. On April 15, 2004, Qwest invited all of its whole customers to participate in mediated negotiations, and, together with MCI, jointly hos industry negotiations. At that time, Qwest was the only ILEC to agree to mediated, as as group, negotiations.

The companies worked together closely to select a mutually acceptable mediator, witl both agreeing on Cheryl Parrino, former chairman of the Public Service Commission o Wisconsin and president of the National Association of Regulatory Utility Commissione

- 4th Quarter of 1999
- 3rd Quarter of 1999
- 2nd Quarter of 1999
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- 2nd Quarter of 1997
- 1st Quarter of 1997
- 4th Quarter of 1996

MCI has participated in both mediated group forums and one-on-one mediated negotiations with Qwest. This deal is a product of those negotiations.

"The mediation process worked well because MCI and Qwest came to the negotiation: with a desire to find a solution that would work for both parties," said Parrino. "I was impressed both with the desire of the participants to understand and address each ot business needs and their ability to find creative solutions to some of the most difficult issues."

The agreement, which is unique within the industry, maintains existing prices throug December 31, 2004; creates a reasonable transition period through January 2007; provides for incremental price adjustments at scheduled points within the transition period; and eases MCI's transition to facilities-based service offerings.

To better reflect market conditions, the deal includes a residential and business price which addresses the unique market needs of these very different customers and resu a smaller rate increase for CLECs that serve residential customers in Qwest's territory Additionally, rates are geographically sensitive. In total, rates for Qwest's "Qwest Plat Plus" (QPP) -- which will replace the unbundled network element (UNE) platform that 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 peric Certain non-recurring charges that MCI incurs to move its customers to its own facilit will decrease.

The agreement includes Qwest DSL services, as well as other services not previously available with a combined wholesale service, providing MCI with the opportunity to ac new features and functionality at a discount - specifically, Advanced Intelligent Netwc (AIN) services and Qwest Voice Messaging services.

Provisions aimed at enabling MCI to transition customers to its own facilities include mutually agreed upon pricing for batch hot cuts – the process through which multiple customer lines are moved from a Qwest switch to a competitor's switch. The batch hc prices may be discounted based on the total number of lines in service. The deal also includes new electronic scheduling and online status tools to make the batch hot cut process more efficient and cost effective for both parties. Additionally, the agreement includes commercial-quality-assurance measures to ensure MCI continues to receive highest-quality wholesale service.

About MCI

MCI, Inc. (MCIA.PK) is a leading global communications provider, delivering innovativ cost-effective advanced communications connectivity to businesses, governments anc consumers. With the industry's most expansive global IP backbone, based on the nun of company-owned points-of-presence, and wholly-owned data networks, MCI develo the converged communications products and services that are the foundation for commerce and communications in today's markets. For more information, go to www.mci.com.

About Qwest

Qwest Communications International Inc. (NYSE: Q) is a leading provider of voice, vi and data services to more than 25 million customers. The company's 46,000 employe are committed to the "Spirit of Service" and providing world-class services that excee customers' expectations for quality, value and reliability. For more information, pleas visit the Qwest Web site at www.qwest.com.

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This release may contain projections and other forward-looking statements that invol risks and uncertainties. These statements may differ materially from actual future ev or results. Readers are referred to the documents filed by us with the Securities and

Exchange Commission, specifically the most recent reports which identify important r factors that could cause actual results to differ from those contained in the forward-looking statements, including but not limited to: the duration and extent of the curre economic downturn in our 14-state local service area, including its effect on our customers and suppliers; access line losses due to increased competition, including fr technology substitution of our access lines with wireless and cable alternatives; our substantial indebtedness, and our inability to complete any efforts to de-lever our bal sheet through asset sales or other transactions; any adverse outcome of the SEC's cu investigation into our accounting policies, practices and procedures and certain transactions; any adverse outcome of the current investigation by the U.S. Attorney's office in Denver into certain matters relating to us; adverse results of increased revie and scrutiny by Congress, regulatory authorities, media and others (including any int analyses) of financial reporting issues and practices or otherwise; further delays in m required public filings with the SEC; rapid and significant changes in technology and markets; any adverse developments in commercial disputes or legal proceedings, including any adverse outcome of current or future legal proceedings related to matte that are the subject of governmental investigations, and, to the extent not covered b insurance, if any, our inability to satisfy any resulting obligations from funds available us, if any; potential fluctuations in quarterly results; volatility of our stock price; inter competition in the markets in which we compete including the likelihood of certain of competitors emerging from bankruptcy court protection or otherwise reorganizing the capital structure and competing effectively against us; changes in demand for our products and services; acceleration of the deployment of advanced new services, suc broadband data, wireless and video services, which could require substantial expendi of financial and other resources in excess of contemplated levels; higher than anticipa employee levels, capital expenditures and operating expenses; adverse changes in th regulatory or legislative environment affecting our business; and changes in the outc of future events from the assumed outcome included in our significant accounting pol

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The following state commissions rebuffed attempts to prevent the FCC's *TRRO* from becoming immediately effective (State commission decisions not publicly available are attached to this list):

- California: Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Application 04-03-014 (Cal. PUC Mar. 11, 2005), *available at* http://www.cpuc.ca.gov/PUBLISHED/RULINGS/44496.htm; Decision 05-03-028, Opinion Confirming the Assigned Commissioner Ruling Denying in Part and Granting in Part Motions for Continuation of Unbundled Network Element Platform, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043 (Cal. PUC March 17, 2005).

- Connecticut: Decision, *Emergency Petition of A.R.C. Networks, Inc. for a Declaratory Ruling Directing Verizon to Continue to Provision Certain UNEs and UNE Combinations*, Docket No. 05-03-07, at 2 (Conn. DPUC May 25, 2005) (dismissing the CLEC's "emergency" petition to block implementation of the TRRO's no-new-adds mandate).

- Delaware: Open Meeting, *Complaint of A.R.C. Networks, Inc., d/b/a InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 27, 2005); Order No. 6611, *Complaint of A.R.C. Networks, Inc., d/b/a InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. P.S.C. May 10, 2005) (denying CLEC petitions to block implementation of the TRRO's no-new-adds directive).

- Indiana: Order, *Complaint of Indiana Bell Tel. Co.*, Cause No. 42749, at 6 (Ind. URC Mar. 9, 2005).

- Kansas: Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, *General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Known as the K2A*, Docket No. 04-SWBT-763-GIT, at 4-5 (KCC Mar. 10, 2005), *available at* http://www.kcc.state.ks.us/scan/200503/20050310170539.pdf.

- Louisiana: Minutes of Open Session, *Pursuant to Special Order 48*, U-28131, at 3-4 (La. PSC Apr. 20, 2005), *available at* http://www.lpsc.org/_pdfs/_minutes/Minutes04-20-05.pdf.

- Maryland: Letter, *Emergency Petition of MCI for a Commission Order Directing Verizon to Continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341 (Md. PSC Mar. 10, 2005).

- Massachusetts: Briefing Questions to Additional Parties, *Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, D.T.E. 04-33 (Mass. DTE Mar. 10, 2005), *available at* http://www.mass.gov/dte/telecom/04-33/310memorbq.pdf (declining to take emergency action to block implementation of *TRRO*'s ban on new UNE-P orders on March 11, 2005); Arbitration Order, *Petition of Verizon New England, Inc. for Arbitration of Interconnection Agreements*, D.T.E. 04-33, at 70-75 (Mass. DTE July 14, 2005) (ruling that the FCC's no-new-adds directives took effect on March 11, 2005).

- Maine: Order, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682 (Me. PUC Mar. 17, 2005), *available at* http://mainegov-images.informe.org/mpuc/orders/2002/2002-682o.pdf.

- Michigan: Order, *Application of Competitive Local Exchange Carriers to Initiate a Commission Investigation*, Case Nos. U-14303, U-14305, U-14327 & U-14463, at 9 (Mich. PSC 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-P and other UNEs that have been removed from the [FCC's] list.").

- New Hampshire: Letter, *Revisions to Tariff No. NHPUC 84*, Docket No. DT 05-034 (N.H. PUC Apr. 22, 2005).

- New Jersey: Order, *Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (N.J. BPU Mar. 24, 2005), *available at* http://www.bpu.state.nj.us/wwwroot/telco/TOQ3090705_20050324.pdf.

- New York: Order Implementing TRRO Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005), *available at* http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/D9FC5211C1457EFA85256FC500768FF4/$File/05c0203.03.16.05.pdf?OpenElement.

- North Carolina: Order Concerning New Adds, *Complaints Against BellSouth Telecomms., Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, SUB 1550, at 10-11 (N.C. Utils. Comm'n Apr. 25, 2005), *available at* http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=MAAAAA51150B.

- Ohio: Entry, *Emergency Petition of LDMI Telecomms., Inc., et al.*, Case Nos. 05-298-TP-UNC & 05-299-TP-UNC, at 3 (Ohio PUC Mar. 9, 2005), *available at* http://dis.puc.state.oh.us/CMPDFs/AL85HKAPM+LK+823.pdf.

- Pennsylvania: Agenda, *Pennsylvania PUC v. Verizon Pennsylvania Inc.*, Docket No. R-00049525 (Pa. PUC Mar. 23, 2005) (Motion of Chairman Wendell F. Holland), *available at* http://www.puc.state.pa.us/general/pm_agendas/2005/pm032305.pdf.

- Rhode Island: Report and Order, *In Re: Emergency Petition for Declaratory Ruling Directing Verizon to Provision Certain UNEs and UNE Combinations*, Docket 3668, at 6-7 (R.I. PUC Mar. 24, 2005; written order issued June 16, 2005); Open Meeting, *Verizon RI Tariff Filing to Implement the FCC's New unbundled (UNE) Rules Regarding as Set Forth in the TRO Remand Order Issued February 4, 2005*, Docket 3662 (R.I. PUC Mar. 8, 2005), *available at* http://www.ripuc.org/eventsactions/docket/3662page.html.

- South Carolina: Commission Directive, *Petition of BellSouth to Establish Generic Docket*, Docket No. 2004-316-C (S.C. PSC Apr. 13, 2005), *available at* http://dms.psc.state.sc.us/attachments3CEB6506-C9D6-00D5-401A523AB6FC1D0B.pdf.

- Tennessee: Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations, *BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 (Tenn. Reg. Auth. July 25, 2005), *available at* http://www.state.tn.us/tra/orders/2004/0400381dx.pdf.

- Texas: Order on Clarification, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 1 (Tex. PUC Mar. 16, 2005), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/28821_542_472352.PDF.

- Virginia: Order Dismissing and Denying, *Petition of A.R.C. Networks Inc. d/b/a InfoHighway Communications, Inc. and XO Communications, Inc. for a Declaratory Ruling Directing Verizon to Continue to Provision Certain UNEs and UNE Combinations*, Case No. PUC-2005-00042 (Va. SCC Mar. 24, 2005).

- Washington: The Washington Commission approved Verizon's TRRO tariff in a meeting on March 31, 2005. In addition, the Arbitrator in Verizon's TRO arbitration proceeding there has confirmed the CLECs may not obtain UNEs de-listed in the TRRO after March 11, 2005. Arbitrator's Report and Decision, *Verizon Northwest Inc.'s Petition for Arbitration of an Amendment to Interconnection Agreements*, Order No. 17, at 35, 40, 44-45 (July 8, 2005).

ALJ/PSW/sid

Mailed 3/18/2005

Decision 05-03-027 March 17, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order.	Application 04-03-014 (Filed March 10, 2004)

OPINION CONFIRMING THE ASSIGNED COMMISSIONER RULING THAT GRANTED IN PART THE MOTION FOR EMERGENCY ORDER GRANTING STATUS QUO FOR UNBUNDLED NETWORK ELEMENT PLATFORM ORDERS

I. Summary

This order confirms the March 11, 2005 Assigned Commissioner's Ruling (ACR) which granted in part the motion for an emergency order granting status quo for the unbundled network element platform (UNE-P) orders, as filed on March 1, 2005, as described below.

On March 1, 2005, a joint motion was filed by MCI, Inc. on behalf of its subsidiary MCImetro Access Transmission Services, LLC ("MCImetro") and its other California local exchange subsidiaries that have adopted MCImetro's

interconnection agreement with Verizon California, Inc. (collectively "MCI");[1] nii Communications, Ltd., ("nii"); Wholesale Air-Time, Inc. ("WAT") (collectively "Joint CLECs"); and The Utility Reform Network ("TURN") (collectively "Joint Movants"). In the Motion, Joint Movants allege that Verizon California Inc. (Verizon), by and through its parent company, Verizon Communications Corporation (Verizon Communications) has stated that beginning on March 11, 2005, Verizon will reject all orders for new lines utilizing the unbundled network element platform (UNE-P). The Movants claim that in doing so Verizon would be taking steps that are inconsistent with Verizon's initiation of this arbitration proceeding, would unilaterally prejudge Verizon's still pending motions to withdraw certain parties from this proceeding, and breach its interconnection agreements with Joint CLECs. Each of the interconnection agreements in question, patterned after that between Verizon and MCImetro, provides that that Verizon shall provision unbundled network elements (UNEs) in combinations, including the UNE-P.

It is alleged that Verizon will take this action pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order, released February 4, 2005 (TRRO). On February 10, 2005, at its website, Verizon provided a notice to CLECs with which it has interconnection agreements, Exhibit A in the Joint Motion, which identifies various facilities on which the FCC made findings of non-impairment with

[1] On March 10, 2005, MCI, on behalf of all its California competitive local exchange carrier affiliates, withdrew from the Motion based on MCI Inc. entering into an interim commercial agreement with Verizon Services Corporation and its local exchange affiliates, including Verizon California Inc., which covers the subject matter of and makes moot MCI, Inc.'s relief request in the Motion.

respect to various unbundled network elements, including those comprising the UNE-P, in the TRRO. The Verizon notice states that these "discontinued facilities" will not be available for addition under § 251(c)(3) of the Telecommunications Act of 1996 and is subject to a transition period.

The Joint Movants thus seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective interconnection agreements and completion of this arbitration proceeding.

The Joint Movants concurrently filed a request for an order shortening time to respond to the motion by no later than 5:00 p.m., Friday, March 4, 2005, in order to enable the Commission to issue Joint Movants' requested relief prior to Verizon's implementation of its planned action to reject Joint CLECs' UNE-P orders beginning on March 11, 2005. Joint Movants argued that the shortening of time is therefore necessary to avoid substantial harm, to the competitive marketplace and to consumers, that Joint Movants allege would result from Verizon's planned actions. Verizon and SBC California objected to any shortening of time, contending the Movants could have made their request earlier.

Based on the representation that Movants were endeavoring to reach some resolution prior to filing their motion and that neither Verizon nor SBC California contend that the date on which Verizon will decline to offer new UNE-P arrangements is other than the date alleged by Movants, the Joint Movants' request for an order shortening time for responses to the Motion was granted by Administrative Law Judge Ruling (ALJ) on March 2, 2005.

Joint Movants seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the

respective ICAs. Joint Movants claim that affected CLECs will be unable to place UNE-P orders in California after March 10, 2005, unless this Commission takes affirmative action to forbid Verizon from rejecting such UNE-P orders pending compliance with the change-of -law provisions in their respective interconnection agreements. Unless such Commission action is taken, Joint Movants claim that CLECs will sustain immediate and irreparable injury because they will be unable to fill service requests for existing and new UNE-P customers.

Pursuant to the schedule set by the ALJ, Verizon filed a response in opposition to the Joint Motion on March 4, 2005. AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, Inc, and TCG San Francisco (jointly AT&T) and Anew Telecommunications, Corp. d/b/a Call America, DMR Communications, Navigator Telecommunications, TCAST Communications and CF Communications, LLC. d/b/a Telekenex (jointly Small CLECs) filed responses in support of the Joint Motion.

The ALJ also specifically identified two questions to be addressed in parties' responses relating to ¶ 227 of the TRRO. The ALJ also authorized replies, filed on March 7, 2005, to the Verizon response limited to these two questions and by Verizon to the AT&T and Small CLEC responses. In response to a March 7, 2005, e-mail request, Joint Movants were granted leave to file a reply pursuant to Rule 45(g) on March 8, 2005.

The Assigned Commissioner issued a ruling on March 11, 2005 regarding Joint Movants' motion. As summarized in the ACR, parties were provided the opportunity to fully brief issues pertinent to a ruling on the motion. The assigned commissioner issued the March 11, 2005 ACR after all affected parties

had fully briefed the motions, including offering a supporting declaration and documents.

II. Confirmation of the ACR

A copy of the ACR is attached as Appendix A hereto. We hereby confirm the ACR in accordance with the provisions of Pub. Util. Code § 310 which states, in part:

> "Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding opinion and order of the commission."

Because the ruling is attached to this decision, we do not repeat its full contents.

Parties' pleadings raise issues concerning the timing of implementation of the provisions of the TRRO relating to new UNE-P arrangements. Specifically, the question is whether the provisions of the TRRO regarding elimination of new UNE-P arrangements form a sufficient basis for Verizon to unilaterally implement the February 10, 2005 Verizon Notice on March 11, 2005, even though parties have not yet completed the process outlined in the interconnection agreements to negotiate appropriate amendments relating to applicable changes of law under the TRRO. As a basis for resolving the issues in the Joint Motion, the relevant authority is in the provisions of the TRRO and the provisions of the interconnection agreements outlining the sequence of events to occur in order to implement applicable changes of law.

Thus, the centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period. To date, there have been few negotiations between Verizon and the petitioners that would lead to interconnection agreement amendments that conform to the FCC's TRRO.

Therefore, to afford the parties additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base as contemplated by the TRRO, Verizon is directed to continue processing CLEC orders for the embedded base of customers, including additional UNE-Ps, until no later than May 1, 2005. Verizon is directed to not unilaterally impose those provisions of the accessible letter that involve the embedded customer base until the company has either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached. During this negotiation window, all parties are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay. In summary, we see three different situations and different implications of the TRRO:

1. For new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005.

2. For existing CLEC customers seeking new serving arrangements involving UNE-P, Verizon will process new orders for UNE-Ps while negotiations to modify the ICA's continue, but will do so only until May 1, 2005 at the latest.

3. During the transition period until March 11, 2006, absent a new ICA, ILECs must continue to maintain the existing serving arrangements involving UNE-P that CLEC customers currently have, but the TRRO has authorized ILECs to increase the price of UNE-P by $1.

III. Comments on Draft Decision

This is an unforeseen emergency in that the request for relief is based on extraordinary conditions in which time is of the essence. (*See* Rule 81(f) of the Commission's Rules of Practice and Procedure.) We therefore waive the 30-day period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(1) as well as the comment period in Rule 77.7. (See also Pub. Util. Code § 311(g)(2) and Rule 77.7(f)(1).)

IV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Philip Weismehl is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The March 11, 2005 ruling on the March 1, 2005 Motion, as set forth above, was made after full briefing.

2. The motion resolves disputes concerning Verizon's announcement that, beginning on March 11, 2005, it would reject all orders for new lines utilizing UNE-P and would also stop processing requests for moves, adds, and changes for each CLEC's existing UNE-P customer base.

3. Verizon made this announcement pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.

4. The ACR determined that:

   a. For new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005;

   b. For existing CLEC customers seeking new serving arrangements involving UNE-P, Verizon will process new orders for UNE-Ps while negotiations to modify the ICA's

continue, but will do so only until May 1, 2005 at the latest; and

c. During the transition period until March 11, 2006, absent a new ICA, ILECs must continue to maintain the existing serving arrangements involving UNE-P that CLEC customers currently have, but the TRRO has authorized ILECs to increase the price of UNE-P by $1.

5. This is an unforeseen emergency situation in that the request for relief is based on extraordinary conditions in which time is of the essence.

Conclusions of Law

1. The March 11, 2005 ruling on the Joint Movants' Motion resolves the issues brought before the Commission relating to disputes over Verizon's obligations on and after March 11, 2005 to continue offering UNE-P for new customers and for additions or other changes to lines for existing UNE-P customers.

2. The March 11, 2005 ruling is consistent with the TRRO and, accordingly, should be affirmed by the Commission in accordance with Pub. Util. Code § 310.

3. The 30-day period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(1) as well as the comment period in Rule 77.7 should be waived in view of the fact that the ACR involves an unforeseen emergency situation.

ORDER

IT IS ORDERED that the Assigned Commissioner's Ruling denying in part and granting in part the motions for continuation of the unbundled network element platform (UNE-P), attached hereto as Appendix A, is hereby confirmed.

This order is effective today.

Dated March 17, 2005, at San Francisco, California

MICHAEL R. PEEVEY
President
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

I dissent.

/s/ GEOFFREY F. BROWN
Commissioner

I reserve the right to file a concurrence.

/s/ DIAN M. GRUENEICH
Commissioner

APPENDIX A

MP1/LLJ/acb 3/11/05

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	Application 04-03-014 (Filed March 10, 2004)

Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders

Introduction

On March 1, 2005, a joint motion was filed by MCI, Inc. on behalf of its subsidiary MCImetro Access Transmission Services, LLC ("MCImetro") and its other California local exchange subsidiaries that have adopted MCImetro's interconnection agreement with Verizon California, Inc. (collectively "MCI"); nii Communications, Ltd., ("nii"); Wholesale Air-Time, Inc. ("WAT") (collectively "Joint CLECs"); and The Utility Reform Network ("TURN") (collectively "Joint Movants"). In the Motion, Joint Movants allege that Verizon California Inc. (Verizon), by and through its parent company, Verizon Communications Corporation (Verizon) has stated that beginning on March 11, 2005, Verizon will reject all orders for new lines utilizing the unbundled network element platform (UNE-P). The Movants claim that in doing so Verizon would be taking steps that are inconsistent with Verizon's initiation of this arbitration proceeding, would unilaterally prejudge Verizon's still pending motions to withdraw certain

parties from this proceeding, and breach its interconnection agreements with Joint CLECs. Each of the interconnection agreements in question, patterned after that between Verizon and MCImetro, provides that that Verizon shall provision unbundled network elements (UNEs) in combinations, including the "UNE Platform (UNE-P). It is alleged that Verizon will take this action pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order, released February 4, 2005 (TRRO). On February 10, 2005, at its website, Verizon provided a notice to CLECs with which it has interconnection agreements, Exhibit A in the Joint Motion, which identifies various facilities on which the FCC made findings of non-impairment with respect to various unbundled network elements, including those comprising the UNE-P, in the TRRO. The Verizon notice states that these "discontinued facilities" will not be available for addition under §251(c)(3) of the Telecommunications Act of 1996 and is subject to a transition period.

The Joint Movants thus seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective Interconnection Agreements and completion of this arbitration proceeding.

The Joint Movants concurrently filed a request for an order shortening time to respond to the motion by no later than 5:00 p.m., Friday, March 4, 2005, in order to enable the Commission to issue Joint Movants' requested relief prior to Verizon's implementation of its planned action to reject Joint CLECs' UNE-P orders beginning on March 11, 2005. Joint Movants argued that the shortening of time is therefore necessary to avoid substantial harm to the competitive marketplace and to consumers

that Joint Movants allege would result from Verizon's planned actions. Verizon and SBC California objected to any shortening of time, contending the Movants could have made their request earlier.

Based on the representation that Movants were endeavoring to reach some resolution prior to filing their motion and that neither Verizon nor SBC California contend that the date on which Verizon will decline to offer new UNE-P arrangements is other than the date alleged by Movants, the Joint Movants' request for an order shortening time for responses to the Motion was granted by Administrative Law Judge Ruling (ALJ) on March 2, 2005.

Joint Movants seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective ICAs. Joint Movants claim that affected CLECs will be unable to place UNE-P orders in California after March 10, 2005, unless this Commission takes affirmative action to forbid Verizon from rejecting such UNE-P orders pending compliance with the change-of -law provisions in their respective interconnection agreements. Unless such Commission action is taken, Joint Movants claim that CLECs will sustain immediate and irreparable injury because they will be unable to fill service requests for existing and new UNE-P customers.

Pursuant to the schedule set by the ALJ, Verizon filed a response in opposition to the Joint Motion on March 4, 2005. AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, Inc, and TCG San Francisco (jointly AT&T) and Anew Telecommunications, Corp. d/b/a Call America, DMR Communications, Navigator Telecommunications, TCAST Communications and CF Communications,

LLC. d/b/a Telekenex (jointly Small CLECs) filed responses in support of the Joint Motion.

The ALJ also specifically identified two questions to be addressed in parties' responses relating to ¶ 227 of the TRRO. The ALJ also authorized replies, filed on March 7, 2005, to the Verizon response limited to these two questions and by Verizon to the AT&T and Small CLEC responses. In response to a March 7, 2005, email request, Joint Movants were granted leave to file a reply pursuant to Rule 45(g) on March 8, 2005.

Sequence of Events Leading to the Motion

On March 10, 2004 Verizon initiated this arbitration intended to address various interconnection agreement issues under change of law provisions and in light of the issuance of the Federal Communication's Commission's (FCC) Triennial Review Order on August 21, 2003. A number of uncertainties developed concerning the status of the TRO, including a federal court decision invalidating portions of the TRO and remanding the matter to the FCC. By ruling, the assigned ALJ questioned parties as to the need for the arbitration to go forward at that time. Ultimately Verizon filed a request on May 6, 2004 to hold the arbitration in abeyance for a brief period. On December 2, 2004, Verizon filed an updated amendment to its petition for arbitration and requested resumption. However, at that time the FCC issuance of what would become known as the TRRO, was imminent, but had not yet occurred.

On February 4, 2005, the FCC issued the TRRO, determining, among other things, that the ILECs are not obligated to provide unbundled local

switching pursuant to [2]Section 251(c)(3) of the Federal Act. The FCC made the TRRO effective as of March 11, 2005. The FCC adopted a transition plan that calls for CLECs to move their UNE-P embedded customer base to alternative service arrangements within twelve months of the effective date of the TRRO and noted the purpose of the transition plan was to avoid substantially disrupting service to millions of mass market customers, as well as to the business plans of competitors. (TRRO, ¶ 226). The FCC also prescribed the basis for pricing during the transition period for unbundled switching provided pursuant to Section 251 (c)(3).

Verizon issued, via its website for CLECs, a "Notice of FCC Action Regarding Unbundled Network Elements" on February 10, 2005 (Verizon Notice, attached as Exhibit A to the Joint Motion) in which in which Verizon notified CLECs that the TRRO had been released and, among other things, that Verizon would cease processing orders for new UNE-P lines starting March 11, 2005. Verizon provided notification to CLECs concerning how it intended to modify its service offerings in response to the TRRO and offered various "alternative arrangements" for CLEC review.

With respect to UNE-P Verizon noted it "is developing a short-term plan that is designed to minimize disruption to your existing business operations. This new commercial services offering would allow your

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[2] Even though the FCC's new unbundling rules end unbundling of certain UNEs under Section 251(c)(3), Verizon has commercial agreements that offer arrangements functionally equivalent to these UNEs, including UNE-P to existing and new customers, and under Section 251(c)(2) it cannot deny similar arrangements to other carriers without facing a charge of discrimination.

continued use of Verizon's network ... for a limited period of time while a longer term commercial agreement is negotiated." Verizon goes on to state: "In any event, to the extent you have facilities or arrangements that will become Discontinued Facilities [including UNE-P], please contact your Verizon Account Manager no later than May 15, 2005 in order to review your proposed transition plans. Should you fail to notify Verizon of your proposed transition plans by that date, Verizon will view such failure as an act of bad faith intended to delay implementation of the TRO Remand Order and take appropriate legal and regulatory actions." (Joint Motion, Ex. A at p. 3).

At almost the same time, on February 14, 2005, Verizon wrote to the assigned ALJ requesting that in light of the issuance of the TRRO this arbitration should proceed as quickly as possible. Verizon stated: "On February 4, 2005, the FCC issued its Triennial Review Remand Order ("TRRO"), memorializing the final unbundling rules the FCC adopted on December 15, 2004. The TRRO requires carriers to amend their interconnection agreements, to the extent necessary to implement the FCC's findings, within twelve months (or eighteen months with respect to the no-impairment findings for dark fiber loops and transport) from the March 11, 2005 effective date of the Order. See id. at ¶¶ 143, 196, 227. The FCC expects ILECs and CLECs to promptly implement the Commission's findings as directed by section 252 of the Act, and has asked state commissions to "ensure that parties do not engage in unnecessary delay." Id. at ¶ 233. Verizon's request included a proposed schedule. This request was being considered when the Joint Motion was filed.

Parties' Positions

Joint Movants argue that Verizon's proposed actions would constitute breach of the Joint CLECs' interconnection agreements in at least two respects: (1) by rejecting UNE-P orders that it is bound by the ICA to accept and process and (2) by refusing to comply with the change-of-law or intervening law procedures established by the ICAs.

In support of its Motion, Joint Movants attached the "Affidavit of Dayna Garvin," the designated contract notices manager for interconnection agreements between MCI's California local service entities and Verizon. Based on Garvin's interactions with MCI mass market business units, Garvin asserts that MCI will be adversely affected in its efforts to provide reasonably adequate service to its mass market customers if Verizon rejects request for new UNE-P orders beginning on March 11, 2005. Garvin asserts that Verizon's refusal to accept new orders will prevent MCI from obtaining new customers, and its refusal to access moves, adds and changes relating to the embedded base of existing customers will lead to inadequate service for those customers.

Joint Movants argue that the TRRO requires that its change-of-law provisions be implemented through modifications to the parties' ICAs. In this regard, the TRRO (¶ 233) requires that parties "implement the [FCC's] findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order."

Thus, this requirement of the TRRO recognizes that some period of time may be necessary for parties to negotiate the appropriate changes to their interconnection agreements to conform to the change of law provisions.

Verizon opposes the Joint Motion in its entirety. Verizon argues that there is no basis for the Commission to prohibit Verizon from terminating

its offering of new UNE-P arrangements effective March 11, 2005, since Verizon is merely complying with the requirements of the TRRO. Although the FCC adopted a 12-month transition period from the effective date of the TRRO, Verizon argues that this period only applies to the embedded customer base of existing UNE-P lines, citing TRRO ¶ 199.

Discussion

Parties' pleadings raise issues concerning the timing of implementation of the provisions of the TRRO relating to new UNE-P arrangements. Specifically, the question is whether the provisions of the TRRO regarding elimination of new UNE-P arrangements form a sufficient basis for Verizon to unilaterally implement the February 10, 2005 Verizon Notice on March 11, 2005, even though parties have not yet completed the process outlined in the ICA to negotiate appropriate amendments relating to applicable changes of law under the TRRO. As a basis for resolving the issues in the Joint Motion, the relevant authority is in the provisions of the TRRO and the provisions of the ICAs outlining the sequence of events to occur in order to implement applicable changes of law.

Applicability of Exceptions Under ¶ 227

The TRRO does, in fact, set different timetables for the embedded customer base versus new customers with respect to the transition period. The TRRO states: "The [12-month] 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.*" (¶ 227).

Verizon interprets this language as prohibiting the CLECs from adding any new UNE-P arrangements after the effective date of the TRRO. Verizon views this prohibition as self-effectuating, and interprets the

limiting clause "except as otherwise specified," as referring merely to carriers' option of voluntarily negotiating "alternative arrangements...for the continued provision of UNE-P," as referenced in ¶ 228.

By contrast, the Joint Movants interpret the clause "except as otherwise specified in this order," as referring to ¶ 233. Specifically, Joint Movants interpret ¶ 233 as entitling Joint CLECs to continue adding new UNE-P customers after March 11, 2005, until the current interconnection agreements are amended to prohibit it. Joint Movants also interpret the reference to "new UNE-P arrangements" to be limited to arrangements for new customers, not including subsequent changes or additions to UNE-P arrangements for existing UNE-P customers.

Parties thus disagree as to whether "new arrangements" refer only to new customers or also include modifications to service arrangements of the existing UNE-P customer base made after March 11, 2005 and whether the exception clause permits the continued provision of UNE-P to new and existing customers pending the development of a new ICA.

We will interpret ¶ 227 and the term "new arrangements" in light of the whole order.

First, we note that the FCC has clearly stated that "Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching." (TRRO, ¶ 5, emphasis added) In addition, it is clear that the FCC desires an end to the UNE-P, for it states ". . . we exercise our "at a minimum" authority and conclude that the 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.*" (TRRO ¶ 204, emphasis added by italics.) Therefore, since there is no obligation and a national bar on the provision of UNE-P, we conclude that "new arrangements" refers to any new UNE-P arrangement, whether to provide service for new customers or to

provide a new arrangement to existing services. The TRRO clearly bars both.

Other parts of the TRRO also support this interpretation. In particular, the FCC also states: ". . . we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.*" (TRRO ¶207, emphasis added by italics, footnote omitted) Note that this last statement refers to "the embedded base of unbundled local circuit switching;" it does *not* refer to an "*embedded base of customers.*" This statement suggests that there is a need only to transition those already having the UNE-P service, and that there is no need to transition customers who buy the UNE-P service over the next twelve months.

Even when the FCC discusses market disruption caused by the withdrawal of UNE-P service, the FCC limits its discussion to the taking away of service from customers who already possess UNE-P. Although the FCC notes in ¶226 that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors," this statement is contained in the section of the TRRO titled "Transition Plan." Thus, the FCC's concerns over the disruption to service caused by the withdrawal of UNE-P are focused on those customers undergoing a transition away from UNE-P. This statement does not indicate that the FCC believes that the failure to provide new UNE-P services to still more customers would be disruptive. Indeed, common sense indicates that it would more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued.

In summary, the only reasonable interpretation of the prohibition of "new service arrangements" is that this term embraces any to any arrangements to provide UNE-P services to any customer after March 11, 2005.

Concerning "the *except as otherwise specified in this Order*" exception contained in ¶ 227, we see that as referring to the need to negotiate serving arrangements, particular as to the customers undergoing transition or already holding service. In particular, the TRRO still contemplated a transitional process to pursue contract negotiations so that CLECs could continue to offer services to new customers and existing customers.

In particular, the TRRO also states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. [footnote omitted] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [footnote omitted] 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [footnote omitted] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* (TRRO, ¶ 233, emphasis added by italics)

This clearly indicates that the FCC did not contemplate that ILEC's would unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the TRRO. Just as clearly, the California Commission was afforded an important role in the process by which ILECs and CLECs resolve their differences through

good faith negotiations. Moreover, the Commission was encouraged by the FCC to monitor the implementation of the accessible letters issued by SBC to ensure that the parties do not engage in unnecessary delay.

The warning against unreasonable delay is meaningful only where a process for contract negotiation was contemplated to implement change of law provisions that could extend beyond March 11, 2005.

Thus, the centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period. To date, there have been few negotiations between Verizon and the petitioners that would lead to interconnection agreement amendments that conform to the FCC's TRRO. Therefore, to afford the parties additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base as contemplated by the TRRO, Verizon is directed to continue processing CLEC orders for the embedded base of customers, including additional UNE-Ps, until no later than May 1, 2005. Verizon is directed to not unilaterally impose those provisions of the accessible letter that involve the embedded customer base until the company has either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached. During this negotiation window, all parties are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

In summary, we see three different situations and different implications of the TRRO:

1. For new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005.
2. For existing CLEC customers seeking new serving arrangements involving UNE-P, Verizon will process new orders for UNE-Ps while negotiations to modify the ICA's continue, but will do so only until May 1, 2005 at the latest.
3. During the transition period until March 11, 2006, absent a new ICA, ILECs must continue to maintain the existing serving arrangements involving UNE-P that CLEC customers currently have, but the TRRO has authorized ILECs to increase the price of UNE-P by $1.

Process for Implementing Applicable ICA Amendments for UNE-P Replacement

Since further ICA amendments are required, no party shall be permitted to use negotiations as a means of unreasonably delaying implementation of the TRRO or attempting to defeat the intent of the TRRO. The TRRO envisioned a limited period of negotiations, to be monitored by state commissions, after which the UNE-P prohibition against new arrangements would take effect.

The dispute resolution provisions of the MCI Agreement are contained in the General Terms and Conditions, §14. The pertinent provisions are:

14. Dispute Resolution

> 14.1 Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute, pursuant to Section 29 of the General Terms and Conditions, that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in

the negotiation. The other Party shall have ten Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

14.2 If the Parties have been unable to resolve the dispute within thirty (30) days of the date of the initiating Party's written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction. In addition, the Parties may mutually agree to submit a dispute to resolution through arbitration before the American Arbitration Association; provided that, neither Party shall have any obligation to agree to such arbitration and either Party may in its sole discretion decline to agree to submit a dispute to such arbitration.

§29 of the General Terms and Conditions requires that the notice of a dispute be in writing and delivered to specified individuals. The Joint Movants contend that by ignoring these dispute resolution provisions, Verizon CA has breached the Agreement.

Thus, in accordance with these provisions of the ICA, parties are to first pursue "diligent efforts" to agree on appropriate modifications to the agreement. According to the Affidavit of Garvin, with reference to the Masoner letter in Exhibit 1 of the Joint Motion, Verizon did not engage in any negotiations with MCI regarding the subject matter of the February 10 Verizon Notice. Verizon replies that for more than two weeks after it advised CLECs that it would no longer accept new UNE-P orders after March 11, 2005, the CLECs did nothing. Garvin states that MCI wrote to Verizon on February 18, 2005, indicating that it considered the February 10 Notice to be an anticipatory breach of MCI's ICA, as well as a violation of the notice, change of law, and dispute resolution terms thereof. (Exhibit 1 of Joint Motion.)

In any event, parties' efforts have failed to produce agreement on the appropriate modifications to implement the change of law provision relating to the elimination of UNE-P. As noted above, Verizon remains obligated to continue offer new serving arrangements involving UNE-P for existing customers until no later than May 1, 2005 or until an agreement is reached As noted above, the FCC has also prescribed the basis for pricing of the embedded UNE-P base during the transition period as provided pursuant to Section 251 (c)(3). The pricing of new UNE-P arrangements added before May 1, 2005 should likewise apply the same transition pricing.

IT IS RULED that:

1. The Motions of Joint Movants and Small CLECs are hereby denied in part and granted in part in accordance with the terms and conditions outlined above.
2. Verizon shall continue to honor its obligations under the TRRO in accordance with the discussion outlined above.
3. Verizon has no obligation to process CLEC orders for UNE-P to serve new customers.
4. Parties are directed to proceed expeditiously with good faith negotiations toward amending the ICA in accordance with the TRRO.
5. If parties have not reached an agreement on the necessary amendments for new arrangements to serve new orders placed by existing CLEC customers, Verizon shall continue processing CLEC orders for UNE-Ps (for these existing customers) until no later than May 1, 2005.

Dated March 11, 2005 in San Francisco, California.

/s/ MICHAEL R. PEEVEY
MICHAEL R. PEEVEY

Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders on all parties of record in this proceeding or their attorneys of record.

Dated March 11, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

NOTICE

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

(END OF APPENDIX A)

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 05-03-07 EMERGENCY PETITION OF A. R. C. NETWORKS, INC. FOR A DECLARATORY RULING DIRECTING VERIZON TO CONTINUE TO PROVISION CERTAIN UNES AND UNE COMBINATIONS

May 25, 2005

By the following Commissioners:

Jack R. Goldberg
Donald W. Downes
John W. Betkoski, III

DECISION

On March 7, 2005, A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corp. (A.R.C.) submitted to the Department of Public Utility Control (Department) an "Emergency Petition for a Declaratory Ruling Directing Verizon to Continue to Provision Certain UNEs and UNE Combinations" (Petition). In its Petition, A.R.C. requested that the Department order Verizon New York Inc. (Verizon) to continue accepting and processing unbundled network element (UNE) and UNE combination orders under the rates, terms and conditions of its interconnection agreements,[1] to comply with the change of law provisions of its interconnection agreements, and for the Department to provide such further relief as it deems just and appropriate.

[1] A.R.C. and Verizon are parties to an interconnection agreement approved by the Department pursuant to 47 U.S.C. §§ 251 and 252. *See*, final Decision dated January 10, 2001, in Docket No. 00-09-39, Application of Verizon New York Inc. for an Interconnection Agreement with A.R.C. Networks.

According to A.R.C., Verizon posted on its website two industry notices that A.R.C. believes are inconsistent with the Federal Communications Commission's Triennial Review Remand Order (TRRO)[2] and the Telecommunications Act of 1996. Specifically, on February 10, 2005, Verizon posted a notification to competitive local exchange carriers (CLECs) that, on or after March 11, 2005, they may not submit orders for new facilities or arrangements that will no longer be made available under 47 U.S.C. 251(c)(3), pursuant to the TRRO. A.R.C. states that by posting the February 10, 2005 notification, Verizon has altered the rights and obligations set forth in existing interconnection agreements without utilizing the change in law provisions of such agreements, which would normally be used to implement orders such as the TRRO.

The second industry notice to which A.R.C. refers is Verizon's March 3, 2005 posted notification requiring CLECs to consult Verizon's published list of non-impaired wire centers before submitting orders for certain UNEs. Should the CLEC submit an order inconsistent with the published list, Verizon's notification states that it would consider the CLEC to have acted in bad faith and in breach of its interconnection agreement. According to A.R.C., the March 3, 2005, industry notice is inconsistent with the TRRO's requirement set forth in ¶ 234 that CLECs self-certify that an order for a high-capacity loop or transport UNE is consistent with certain other parameters set forth in the TRRO.

A.R.C. believes Verizon's stated course of action would breach the parties' interconnection agreement and therefore seeks emergency declaratory relief to prevent Verizon from acting consistent with its February 10, and March 3, 2005 industry notices.

As in Superior Court, administrative declaratory rulings can be used to resolve uncertainty of legal obligations. *See*, General Statutes of Connecticut (Conn. Gen. Stat.) § 52-29. However, for the Department to find the instant Petition ripe for adjudication, it must conclude that the Petition "does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." Milford Power Co., LLC v. Alstom Power Inc., 263 Conn. 616, 626 (2003). The TRRO requires carriers to implement that order's rule changes through amendments to their interconnection agreements. TRRO, ¶ 233. While A.R.C. presumably considers Verizon's act of posting the February 10, and March 3, 2005 notifications as creating a justiciable claim, it is possible that A.R.C.'s interconnection agreement with Verizon may be amended before any actual controversy arises. Because future litigation may never arise, the Department declines, pursuant to Conn. Gen. Stat. § 4-176, to issue a declaratory ruling on A.R.C.'s Petition, and hereby dismisses the Petition without prejudice.

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[2] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005).

DOCKET NO. 05-03-07 EMERGENCY PETITION OF A. R. C. NETWORKS, INC. FOR A DECLARATORY RULING DIRECTING VERIZON TO CONTINUE TO PROVISION CERTAIN UNES AND UNE COMBINATIONS

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

Donald W. Downes

John W. Betkoski, III

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard — May 27, 2005

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
VOLUME 1

IN RE: IN THE MATTER OF THE COMPLAINT OF A.R.C. NETWORKS, INC., D/B/A INFOHIGHWAY COMMUNICATIONS, AND XO COMMUNICATIONS, INC., AGAINST VERIZON DELAWARE INC., FOR EMERGENCY DECLARATORY RELIEF RELATED TO THE CONTINUED PROVISION OF CERTAIN UNBUNDLED NETWORK ELEMENTS AFTER THE EFFECTIVE DATE OF THE ORDER ON REMAND (FCC 04-290 2005) (FILED MARCH 7, 2005)	:	PSC DOCKET NO. 334-05

Public Service Commission Hearing taken pursuant to notice before Gloria M. D'Amore, Registered Professional Reporter, in the offices of the Public Service Commission, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware, on Tuesday, March 22, 2005, beginning at approximately 1:29 p.m., there being present:

APPEARANCES:

On behalf of the Public Service Commission:
ARNETTA MCRAE, CHAIR
JOSHUA M. TWILLEY, VICE-CHAIRMAN
DALLAS WINSLOW, COMMISSIONER
JAY LESTER, COMMISSIONER
JOANN CONAWAY, COMMISSIONER

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APPEARANCES CONTINUED:

On behalf of the Public Service Commission Staff:
GARY A. MYERS, ESQUIRE

On behalf of the Public Service Commission Staff:
BRUCE H. BURCAT, EXECUTIVE DIRECTOR
CONNIE S. MCDOWELL, CHIEF OF TECHNICAL SERVICES
KAREN J. NICKERSON, SECRETARY

On behalf of the Office of the Public Advocate:
JOHN CITROLO

On behalf of Verizon Delaware Inc.:
ANTHONY E. GAY, ESQUIRE
SHARI SMITH

On behalf of A.R.C. Networks, Inc.:
BARRY M. KLAYMAN, ESQUIRE
PAULA BULLOCK

CHAIR McRAE: All right. Item 7. This is the complaint of A.R.C. Networks against Verizon.
Is A.R.C. here?
MR. MYERS: There is a representative from A.R.C. Networks. And Mr. Gay is here for Verizon.
MR. KLAYMAN: Good afternoon. My name is Barry Klayman. I am with the law firm of Wolf, Block, Schorr and Solis-Cohen. I'm here on behalf of InfoHighway Communications.
With me is Paula Bullock, who is the Director of Regulatory Affairs for the company.
InfoHighway Communications is a Competitive Local Exchange Carrier. It serves small businesses with telecommunication services in Delaware.
In order to provide those services, InfoHighway Communications needs to be able to provide end-to-end service, as you all know. And to do that, InfoHighway needs access to Unbundled Network Elements such as, essentially, local loops, local switching and interoffice transport facilities.
We have filed a petition seeking emergency declaratory relief from the Commission. In response to Verizon's stated intent to discontinue accepting and processing orders for Unbundled Network Elements, under the terms of its Interconnection Agreements with Competitive Local Exchange Carriers, such as InfoHighway Communications, beginning on March 11th. That's why we sought the emergency relief.
Essentially, we asked for two forms of relief from the Commission. One is a declaration or an order that requires Verizon to continue to accept these -- to accept and process orders for the Unbundled Network Elements pursuant to their Interconnection Agreements with various Competitive Local Exchange Carriers, including InfoHighway Communications. And to require Verizon to comply with a change of law provision that is contained in the Interconnection Agreements, when they go about implementing the FCC's Triennial Review Remand Order.
As I understand it, Verizon, pursuant to their interpretation of the FCC's Triennial Remand Order, they have advised Competitive Local Exchange Carriers that they will reject these orders after March 11th, and they seek unilaterally to impose an interim agreement on these carriers of charges that they have set by themselves without any negotiations with the local carriers and without any process being afforded to the Competitive Local Exchange Carriers.
We argue in the petition that we have filed that there are three reasons why Verizon cannot do what it has been asked -- it intends to do.
First, we have argued that the other provisions of the Telecommunications Act requires Verizon

to continue to provide these Unbundled Network Element services to Competitive Local Exchange Carriers. And we cite, specifically, to Section 271 of the Telecommunications Act, which imposes the former bell operating companies, we believe, an obligation to continue to provide the Unbundled Network Elements until such time that certain conditions are met, which have not yet been met.

Second we argue that pursuant to the terms of the Verizon GTE Merger Agreement, there is an independent obligation that Verizon assumed to provide these Unbundled Network Elements to Competitive Local Exchange Carriers pursuant to the terms of that agreement. And that the FCC Triennial Remand Order does not impact, in anyway, on that obligation and that still remains.

But, finally, we come to, I think what is probably the strongest argument, which is the Interconnection Agreement that Verizon has with my

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client. That has in it a rather standard change in applicable law provisions and provides, basically, that if there's going to be any material -- any material change to a provision of the agreement -- that the parties have to re-negotiate in good faith to amend the agreement in writing. And if they are unable to do that, the agreements provide that the parties may pursue remedies available to them, including but not limited to, instituting appropriate proceedings before this Commission, the FCC, or a court of competent jurisdiction.

Essentially, what it requires is that Verizon has to negotiate in good faith with InfoHighway about the provision of services going forward, as opposed to just announcing that they are going to terminate the provisions and unilaterally setting up an interim rate structure. And failing if those negotiations are not able to be concluded, there are remedies available to both parties, if they are unable to reach agreement and to reduce that agreement to writing.

We see nothing in the FCC's Triennial Review Remand Order that authorizes Verizon to merely disregard the Interconnection Agreement that they have with InfoHighway.

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We believe that they need to comply with the Interconnection Agreement. And as a result, they are required to negotiate with us. And absent an agreement, then, perhaps, come back to the Commission, again, to have the matter resolved.

Thank you.

CHAIR McRAE: Mr. Gay.

MR. GAY: Good afternoon. Madam Chair and Commissioners.

Once again, Anthony Gay for Verizon. Quite simply, what Mr. Klayman stated is not the case.

The issue before you is quite simple and quite straightforward, and, I believe, in a nutshell, Verizon is implementing terms of the FCC Triennial Review Remand Order.

Now, by way of background, the TRRO is the FCC's order that is a response to a D.C. Circuit Court of Appeals decision that, in essence, found that

the FCC had never had valid and lawful unbundling rules. And what I mean by that is, rules requiring certain elements of Verizon's network to be leased to Competitive Local Exchange Carriers like A.R.C..

That decision was attempted by carriers like A.R.C. to be appealed to the Supreme Court. The

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Supreme Court denied review of the D.C.'s Circuit decision, and, therefore, it's the law of the land.

On February 4th, the FCC issued rules complying with the law of the land. And this is what they said in that February 4th decision.

As of March 11, 2005, CLECs are not permitted to add new UNE P arrangement using unbundled access to local service switching.

Now, what are a UNE P arrangement is a fancy word for, basically, allowing someone to use part of Verizon's network to provide service. That is one way you can do things. The FCC determined that there are other ways you can provide phone service. And, in essence, they felt that UNE P was such an addictive mechanism for CLECs to, instead of investing facilities to provide true competition, like Comcast provides competition now with Voice Over IP. Or like, Cavalier provides competition with UNE L loops. I'm kind of surprised that they're not a UNE P provider in Delaware.

The FCC said, Look, we find that there should be a nationwide bar on UNE P. That's what they said in February 4th order to comply with the D.C. Circuit's what's called institute remand.

That is what is at issue here. We are

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implementing what the FCC said Verizon should do. It said, as of March 11th, no new UNE P arrangements. For existing customers, they need to be off the network -- Verizon's network by March 11, 2006, within 12 months.

What A.R.C. is asking you to do today, what they're trying to persuade you to do today is stay an FCC order.

First of all, I would submit the Commission should not and cannot do that. This is binding law. As I said, it has been up to the steps of the Supreme Court. The Supreme Court declined to overturn what was the D.C. Circuit's decision, which is the FCC is trying to implement now.

I would also say that the majority of commissions that have seen similar petitions by A.R.C. and other CLECs have denied it. It includes the New York commission, the New Jersey commission, the Maryland commission. Several other commissions.

And I just want to get into what are really the key points here.

First of all, as I said before, this is binding law.

Second of all, A.R.C. is trying to persuade you to stay binding law by saying we are

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violating our Interconnection Agreements.

I will quote for you in a moment applicable language in our Interconnection Agreement, which says, in essence, notwithstanding anything else in these agreements, if we provide 30 days notice in the judicial or regulatory order that says we can stop

providing a frequent service. It also says, in some instances, specifically, UNE P services.

CHAIR McRAE: Are you speaking of Section 4.6 and 4.7, those two provisions?

MR. GAY: I am glad you raised that, Madam Chair..

A.R.C. raised what we believe is a red herring. We believe the agreement they are operating under is the Conectiv agreement. They have raised another breach in the Z-TEL agreement.

To answer your question, I think you're referring to the Z-TEL agreement?

CHAIR MCRAE: Well, I guess my question ultimately was going to be what agreement. I'm not exactly clear. Are you talking about something other than Z-TEL, when you are referring to the contract language?

MR. GAY: Madam Chair, I would say it's

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irrelevant, because both agreements have language which allow us to terminate services. In this instance, the FCC said we do not have to provide upon 30 days written notice. But let's go with the Z-TEL agreements --

CHAIR McRAE: Well, both agreements have the same two provisions that you're referring to?

MR. GAY: And I would like to read one that particularly deals with what is at issue here today.

I'm referring to Section 4.7 of the Z-TEL agreement. I think A.R.C. referred to Section 4.6.

MR. MYERS: I got copies.

CHAIR MCRAE: I think it would be helpful. What other agreement are we talking about, for my own benefit?

MR. GAY: Well, Madam Chair. There is the Conectiv agreement, also. Again, I believe this is a red herring. I think very quickly --

CHAIR MCRAE: Well, so we are all on the same page, it would be helpful if we could agree as to which document, even though the language may be the same, and maybe I could look to InfoHighway. Because I do recall there was a bit of back and forth between the two companies about who said what, when it was received and acted upon and the like. And so, that seems to be still

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somewhat unclear.

So, which agreement are you referring to?

MR. KLAYMAN: We believe that the applicable agreement is the Z-TEL agreement. And that there was an adoption by InfoHighway of that agreement. There was an exchange of paperwork with Verizon.

And it is my understanding, I think that Verizon failed to file anything with the commission. But I don't think that that effects the contract, the terms of the contract that control as between InfoHighway and Verizon.

CHAIR MCRAE: Well, I interrupted Mr. Gay. I'm sure he has a different characterization of what took place with that, from what I read in the documents. So, I mean, if you will continue. At least I know we're talking for purposes of the discussion of Z-TEL.

MR. GAY: Madam Chair, I do discourage

that recollection of the facts here.
Z-TEL did not elect to sign the adoption agreement, or, excuse me, A.R.C. did not elect to sign the adoption agreement for the Z-TEL agreement until after the agreement expired. In our papers we said, we

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sent them an adoption agreement. In that adoption agreement, it said that this agreement expires on June 1, 2003. They sent in their adoption in July of 2004. So, more than a year later.
But if they want the Z-TEL agreement -- for purposes of this discussion, I don't want to get waylaid. The language is the same. As a matter of fact, the language in the Z-TEL agreement specifically says, Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, if the commission or FCC or court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE's or Combination, Verizon may terminate its provision of such UNE's or Combination to Z-TEL for new customers. That is Section 1.5 of the Z-TEL agreement.
CHAIR MCRAE: There is another provision that says, the parties shall negotiate if something occurs. I'm not sure how they interact with each other.
MR. GAY: Well, I would say the language is clear. It says, Without limiting Verizon's rights pursuant to Applicable Law, or any other section of this agreement. And then 4.7 says, Notwithstanding anything

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in this Agreement to the contrary, if, as a result of any legislative, judicial decision or governmental decision, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise, provided to Z-TEL hereunder, Verizon may discontinue the provision of any such, Service, payment or benefit.
So, the language here, and, again, I think we need to start with, what is the law. And I think the FCC was clear, as of March 11, 2005, there will be no new UNE adds and all customers -- existing customers would be off of UNE's by March 11, 2006. That's where you have to start. That's mandatory law.
CHAIR MCRAE: If we take that, I would just note, that's, at least the application of it is by no means clear because I'm looking at you named New Jersey, New York. There's Michigan, Illinois. Both sides of the table have kind of looked at what you are setting forth is absolute, almost black letter has, apparently, being addressed at the state level different ways.
MR. GAY: I would say, the overwhelming majority of the states, and I can read them for you, have denied these petitions and said they are going to follow governing law.

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My knowledge is only four commissions have determined otherwise. That is Georgia, Illinois, Michigan.
CHAIR MCRAE: What is the other one? California is on the other side. I think there were four in your filing identified.
MR. KLAYMAN: I believe the states that

have gone in our favor include, also, Alabama, Illinois, Georgia, Kansas, Kentucky, Michigan, Missouri and Ohio.

MR. GAY: No. Kansas has not gone --

MR. KLAYMAN: I stand corrected.

CHAIR McRAE: Let's just note, it is not as cut and dry as it appears on the surface that the states have been somewhat divided on these issues.

With that said, moving on.

MR. GAY: Madam Chair, as I said, I have three points.

First of all, the law that has been up to the steps of the Supreme Court is binding law. I would just say, as you know, and as other commissioners know, we are at the end of a long road that began in 2003 with the TRO. It went to D.C. Circuit.

The FCC, in August of 2004, came back and indicated we will follow the findings of the D.C.

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Circuit, that, in essence, the D.C. Circuit said after eight years, the FCC had failed to issue any laws of unbundling rules.

And in their August 2004 order, they indicated that they were going to follow the FCC rules, or D.C. Circuit's rules as they must.

In December of 2004, in its news release, you can't get much clearer than this, December 15, 2004, the FCC said, The incumbent LEC's have no obligation to provide competition LEC's unbundled access to mass market local switching. Again, pretty clear.

Then, on February 4, 2005, this past February they said that, as of March 11th, there should be no new UNE adds.

So, this is, governing law. I believe that the commission's own statute, Title 26 of the Delaware code, gives the Commission, basically, some clear instructions. I will just read Section 7034. The Commission is authorized in power to take -- and in power to take such action and enter such order that is permitted or required by State commissions under the Telecommunication Act of 1996.

The FCC is the body that is charged with interpreting that Act. With the guidance of the court,

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the D.C. Circuit has provided guidance.

So, this is binding law. We cited case law, Supreme Court case law that says, Contractual arrangements remain subject to subsequent legislation. That's Supreme Court case law. It's a pretty simple point. You can't contract around the law. You can't contract and do something that's unlawful.

I think we have been through the Interconnection Agreement. I don't want to belabor you. And, I think, at the structural level, again, you have to look to mandatory law. As I said, we are complying with the Interconnection Agreements. The Interconnection Agreements say, Without regard to anything else in these contracts, if we provide 30 days written notice of implementing a valid regulatory or judicial decision, we can, then, terminate provision of that service. These contracts say, Without regard to anything else. So, we are filing the Interconnection Agreement, that is applicable, whichever one A.R.C. picks because both ones have the same terms. We are following the terms of that

agreement.

Now, A.R.C. has come before you to say, there is some emergency here. I don't think that beers with facts.

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As I mentioned before, this goes back, at least, to when the D.C. Circuit clearly said that the FCC had failed to implement any lawful unbundling rules.

To bring it back a little bit closer, in December of 2004, the FCC said that the ILEC's have no obligation to unbundle mass market switching, which is what is at issue here.

February 4th, they made clear in their review order, their order to be consistent with federal law, they were given guidance by the D.C. Court of Appeals that as of March 11th, it is the end of UNE P. Make other arrangements.

And in making the determination here that CLEC's need to move away from UNE P, they did so on two grounds. Number one, they found that it is a disincentive for investment of true competition. And also, they found that it's time. It's over. The use of UNE P is defunct. It is an unlawful business model.

So, there is no emergency here, other than A.R.C.'s creation of an emergency, but in determining that UNE P was over, the FCC found in the TRRO, that there are alternative arrangements to one means of providing telephone service, which is UNE P. The FCC determined that there is Voice Over IP. There is

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cable. There are other providers that can get service.

So, to make it seem that UNE P is the only option is just incorrect. And The FCC has already determined that ILEC's need to get off of that. They are saying, no new customers as of March 11th. And then they are saying, get everyone else off within a year.

So, to claim some armor that there are no alternative, the FCC has already decided this. These arguments have raised before the FCC numerous times and have been before you numerous times.

I will stop there for any questions you might have.

CHAIR MCRAE: That's very good of you. Thank you. I understood you clearly to say, many times, how clearly the FCC said what it said. And yet, we have this extensive record of rehashing what the FCC said and the division around that. This is not to take away from the merits of the argument that you made. It's just, I think, pretty well established that clear is not altogether clear. At least from the record that has been established over several years we have been dealing with these TELCOM issues.

But I certainly heard the basis of your points here.

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Mr. Klayman, you might want to respond before we open it to the Commissioners for questions.

MR. KLAYMAN: The only point I would make, the emergency comes from unilateral imposition of an internal agreement by Verizon under these circumstances.

Even the Triennial Review Remand Order required the Incumbent Local Exchange Carriers and the

Competitive Local Exchange Carriers to negotiate in good faith regarding any rates, terms and conditions that were necessary to implement the rule change. That is what we say that the Interconnection Agreements require, as well.

All we are asking is that the status quo be maintained while the parties negotiate in good faith regarding the implementation of these orders.

Thank you.

CHAIR McRAE: Commissioners.

COMMISSIONER LESTER: Well, as Mr. Gay said, sufficient notification that as of March 11th. Correct?

MR. GAY: We provided it February 10th.

COMMISSIONER LESTER: Well, even before that, it was provided. You are not excluding the CLEC's from Interconnection Agreements.

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Correct?

MR. GAY: No. Interconnection Agreements --

COMMISSIONER LESTER: But they will be at the new terms?

MR. GAY: I think there are two things we need to keep in mind.

As of March 11th, there should be no new UNE P arrangements. That is in the FCC's order. It would be unlawful for us to come back with a contract saying, unless we can privately negotiate something, but not for UNE P. We might be able to negotiate alternative UNE P type arrangements. And what they are trying to do is ask you to override federal law by saying, Hey, we will keep providing to our A.R.C. UNE P after March 11th.

So, there has been plenty of notice. I would say, notice went back to March of last year when the D.C. Circuit said the FCC's unbundling rules were unlawful.

CHAIR McRAE: Other questions. I would continue to say, we're dealing with an interpretation of federal law. But some of the concerns that I have around here that makes me question the urgency of this order is the fact that this is not, frankly, a new matter. I do

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believe that notice was given that what was going to occur, with respect to the UNE P, the UNE Platform agreement. And an alternative was offered. I forgot the language that you used for this other arrangement that is a substitute.

MR. GAY: There are two alternatives. There's the wholesale advantage program and interim UNE service plan for CLEC's, also. There is an interim one and then there is a more long term one, wholesale advantage.

CHAIR McRAE: I do know that there exist, at least, two alternative plans that were identified. And I do agree that it is unequivocal that as of March 11, 2006, it is fully expected that everybody is going to be off of these UNE P arrangements. So, it becomes arguable what is the benefit of going into this process now, particularly when there are alternative arrangements present, as to why we should grant the emergency petition in this matter.

And I, frankly, have not found compelling basis for that. I'm just one Commissioner

here. I just have not identified anything that supports the position that you're foreclosed from alternative arrangements.

And my understanding is that the ultimate goal is to redirect parties to alternative arrangements as technology is moving, and there is alternative offering.

So, while I can't say I fully agree with Mr. Gay on the clarity of all of when this occurs, I have not seen a case to support why we should not proceed to move away from UNE at this juncture. And, actually, looking at the language of the agreement, although it does raise some issue in terms of two provisions together, I do believe it is also a good argument to be made that there is a notice provision that says with a change that they are permitted to do those things.

So, I really have not seen anything or heard anything that really runs counter to that at this point.

MR. KLAYMAN: Madam Chair, we did submit with our papers an affidavit from a representative of InfoHighway that was directed at the issue of harm to InfoHighway from the imposition of these changes. And we would rest on the papers that we submitted in that regard.

CHAIR MCRAE: Yes. I did see that. It seemed to me, how many lines are we talking about here?

MR. KLAYMAN: We have 670 lines currently.

CHAIR MCRAE: Currently. So this effects new. So, we're not talking about all of those lines. Some of that is already in place?

MR. KLAYMAN: Correct.

CHAIR MCRAE: What are we talking about in terms of new?

MR. KLAYMAN: I can't tell you in terms of lines. Obviously, what Verizon is proposing is 40 percent increase in the rate, which we think will dramatically impact our ability to add any lines in Delaware.

CHAIR MCRAE: Well, it is a very tough call. From what I see, I honestly cannot defend a continuation. I don't see immediately a basis for this commission to approve this petition for emergency relief.

VICE CHAIRMAN TWILLEY: Madam Chair. May I ask some questions.

CHAIR MCRAE: By all means.

VICE CHAIRMAN TWILLEY: The end result of what Verizon is doing is to increase your cost by 40 percent.

Is that what you are saying?

MR. KLAYMAN: Correct.

VICE CHAIRMAN TWILLEY: So you can still get the Unbundled Network Elements. It is just going to cost you 40 percent move?

MR. KLAYMAN: Correct.

VICE CHAIRMAN TWILLEY: So you are not out of business?

MR. KLAYMAN: We're not out of business in that sense. But that's all the more reason why we

believe that Verizon should be required to negotiate those new rates with us to negotiate in good faith, rather than merely announce them and present them as a fait of accompli to the Competitive Local Exchange Carriers.

VICE CHAIRMAN TWILLEY: So, you knew a long time ago, that March 11th was a cut off time?

MR. KLAYMAN: I think we knew that. I don't know that we knew what the interim agreement would be that was going to be proposed by Verizon.

VICE CHAIRMAN TWILLEY: You mean, Verizon had not yet said what their new rates were going to be?

MR. KLAYMAN: Correct. It had not undertaken any negotiations with any of the Competitive

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Local Exchange Carriers to discuss what those new arrangements might be.

VICE CHAIRMAN TWILLEY: Well, how much advance notice did you have of the new rates?

MR. KLAYMAN: I'm not sure I know the answer to that. I'm sorry. I don't know the answer to that. Perhaps Mr. Gay does.

MR. GAY: Commissioner Twilley, I think they had a lot of advance notice of the wholesale advantage package. Since the original Triennial Review Order came out in 2003, we have been trying to negotiate that with CLECs.

Now, several have come to the table more recently when the FCC made its announcements. I won't disagree with the Chair and say that was clear, although I think the terms are quite simple. The wholesale advantage has been out there since the original TRO Order, which came out in 2003. And Verizon followed that pretty quickly.

CHAIR McRAE: There was some communication between the two of you. It didn't come out in that communication. I thought I saw reference -- was it February. I could be wrong.

MR. GAY: We sent industry notice

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letters back on February 10th.

CHAIR McRAE: That's February 10th is what came to my mind. I think that is responsive to Commissioner Twilley's question. Frankly, as I recall, from the record, at least that's what I read.

VICE CHAIRMAN TWILLEY: So, basically, they had, at least, a month's notice?

MR. GAY: Yes. To answer your question direct, at least a month's notice. We believe more.

VICE CHAIRMAN TWILLEY: Did you do anything during this month?

MR. KLAYMAN: I'm not sure I can answer that question. I'm sorry.

I'm sorry. I'm not able to answer that question. I don't know the answer to that question factually.

VICE CHAIRMAN TWILLEY: Thank you.

CHAIR McRAE: Other questions from Commissioners?

COMMISSIONER CONAWAY: No.

COMMISSIONER LESTER: Not at this point.

CHAIR McRAE: If there are not any

questions, someone suggest an action here.
VICE CHAIRMAN TWILLEY: Madam Chair, may

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I make an observation. If I'm not correct, please anybody correct me.
But it seems to me that for the last couple of years, at least, we have been hearing loud and clear from Verizon, and, I guess, the other baby bells, too, that the rates they had to charge, in order to encourage competition, have been way below cost?
CHAIR McRAE: Yes.
VICE CHAIRMAN TWILLEY: And they are losing lots of money that way, and they want to terminate them. There has been no doubt about the loud and clear, shouting and screaming from Verizon that they are, basically, subsidizing competition because the rates are too low. So, that has been known all along. It's no secret.
CHAIR McRAE: It has been said all along. I will, certainly, acknowledge that it has been said all along. I have not seen the books.
VICE CHAIRMAN TWILLEY: Of course. And since Verizon was the only carrier that had these elements, there wasn't anybody else who could provide them.
Now, I gather, if I'm hearing it correctly, the FCC has said that there are alternative

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ways for these companies to get the services they need. And the original decision to require Verizon to provide these things at what Verizon calls below cost is no longer correct. And so, it's terminated on March 11th. That's, basically, where it is, after you cut through all of the complicated crap -- that 25 pages of argument provided.
CHAIR McRAE: I generally would agree with you that that is what it says. It is abundantly clear with respect to March 11, 2006 being the absolute end point. And with the way technology is evolving and various alternatives currently available, yes, it is certainly the position that --
VICE CHAIRMAN TWILLEY: But there is a dilemma here.
CHAIR McRAE: There is a cost issue.
VICE CHAIRMAN TWILLEY: The dilemma that I see is that we don't believe the FCC. We don't believe that there are alternative ways to get the services at a price that can permit competition in the arena.
So, we would like to help, but the FCC, basically, has vetoed that, or the courts, I guess, or both.
CHAIR McRAE: Well, this whole

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regulatory aspect, as Mr. Gay has alluded to, with respect to the background of this telecommunications, I don't think there has been ever been any really clear articulation. The FCC has said something. The District Court has responded. We have been back and forth.
What has been arguably clear has not been to the extent that states have evolved in very different ways of looking at this from a state interest standpoint. So, states want to ensure that you have as much competition as possible. So, I think the measures

by some states have lead to interpreting what the FCC and the court said in one way. And another set of states, I think we just heard a list on both sides. So, when you suggested it is cut and dry, clearly states have viewed this in two different perspective.

I have expressed mine that under this current set of facts, I really cannot justify granting the relief that's requested because I do believe that an alternative is available. And it is now an issue of cost, which the parties are going to have to work out, independent of our role in this Commission. That's my personal perspective. But, I think, depending on who you talking to, you might get different view around clarity when it comes to telecommunication. It is somewhat the

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state of affairs.

VICE CHAIRMAN TWILLEY: Madam Chair, but overriding all of this, and not really irrelevant, but overriding it all, is the fact that telecommunication in this country is changing so fast, that these issues that we are hassling with today are rapidly becoming irrelevant themselves. And Verizon is losing its business pretty fast. Not to these kind of competitors, but to Cell phones. Because even in our own area of knowledge, we have friends now who have disconnected from the landlines altogether and used Cell phones as a way to communicate. And that's causing Verizon to continue to lose business and it's going to lose business in the future as well. So, it's faced not only with that, but with this other --

CHAIR McRAE: This is the second time here.

(Cell phone ringing.)

VICE CHAIRMAN TWILLEY: There goes one out the door.

CHAIR McRAE: There is one hiding in the background who was responsible before.

VICE CHAIRMAN TWILLEY: I guess what I'm saying here is that, I no longer regard Verizon as the

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Ma Ma of it all. Verizon is rapidly shrinking.

CHAIR McRAE: I am sure they will be glad to hear you say that.

We have a matter before us. I, certainly, recognize the point you are making. In fact, in some arenas, the argument is not that we are just talking voice, we are talking communications and various modes. You got Voice Over IP. Any number of new technologies. Voice is not the dominant discussion point. And all of that is going to play out over time. And I do agree that we are transitioning away from what we traditionally know as phone service. Perhaps, for you, it's one leap for mankind. I'm still kind of marching along. But, yes, change is occurring. And I do believe we all have to recognize that point and part of the basis for my feeling here.

COMMISSIONER WINSLOW: I move that the A.R.C. Networks, Incorporated petition for emergency declaratory relief be denied.

VICE CHAIRMAN TWILLEY: I second it.

CHAIR McRAE: All in favor.

Yea.

COMMISSIONER LESTER: Yea.

COMMISSIONER CONAWAY: Yea.

COMMISSIONER WINSLOW: Yea.
VICE CHAIRMAN TWILLEY: Yea.
CHAIR McRAE: Opposed? Thank you.
MR. CITROLO: Madam Chair, I would like to point out something while Verizon is still here.
Last week I got a call from one of the governor's cabinet members about services from Verizon. And I just want to say that they addressed it and resolved it very quickly. I want to thank them for making me look like I know what I am doing.
(The Public Service Commission Hearing was concluded at, approximately, 2:10 p.m.)

C E R T I F I C A T E

STATE OF DELAWARE:
:
NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.
WITNESS my hand and official seal this 27th day of March A.D. 2005.

GLORIA M. D'AMORE
REGISTERED PROFESSIONAL REPORTER
CERTIFICATION NO. 119-PS

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE COMPLAINT OF A.R.C. NETWORKS, INC., D/B/A INFO-HIGHWAY COMMUNICATIONS, AND XO COMMUNICATIONS, INC., AGAINST VERIZON DELAWARE INC., FOR EMERGENCY DECLARATORY RELIEF RELATED TO THE CONTINUED PROVISION OF CERTAIN UNBUNDLED NETWORK ELEMENTS AFTER THE EFFECTIVE DATE OF THE ORDER ON REMAND (FCC 04-290 2005) (FILED MARCH 7, 2005)	)	PSC COMPLAINT DOCKET NO. 334-05

ORDER NO. 6611

This 10th day of May, 2005, the Commission determines and Orders the following:

1. This docket is yet another proceeding that arises under the regime instituted by the 1996 federal Telecommunications Act ("the Act"). And, as in many of the other proceedings involving the Act, here the Commission's role is relatively narrow: to attempt to devine and apply directives issued by the Federal Communications Commission ("FCC"). In this particular matter, those directives are ones announced in the FCC's "TRO Order on Remand,"[1] the federal agency's latest effort to delineate the "unbundled network elements" ("UNEs") that incumbent local exchange carriers must offer to lease (at "TELRIC" prices) to competing local exchange carriers ("CLECs"). See 47 U.S.C. § 251(c)(3), (d)(2). The specific question now concerns exactly how the FCC directed carriers to implement its decision to

[1] *In the Matter of: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Dckt. No. 04-313 & CC Dckt. No. 01-338, Order on Remand, FCC 04-290 (FCC adopted Dec. 15, 2004; rel. Feb. 4, 2005) ("Order on Remand").

"declassify" (or remove) mass market local circuit switching" (and, hence, the "UNE-P" combination) as a network element that must be offered under § 251(c)(3).[2] Moreover, the Commission has been asked to perform this task on a very expedited basis. A.R.C. Networks, Inc. ("InfoHighway"), the complaining CLEC, filed its petition for an "emergency" declaratory ruling on March 7, 2005, just four days before the March 11th date when InfoHighway said Verizon Delaware Inc. ("VZ-DE") would begin breaching the terms of their interconnection agreement.[3] And after receiving a bevy of pleadings, most with numerous attachments, the Commission considered InfoHighway's request at its public meeting on March 22, 2005. After hearing from the parties, the Commission decided (5-0) to deny InfoHighway's request for an immediate emergency declaration that would tell VZ-DE to continue to provide UNE-P combinations to InfoHighway for its new

[2]The "UNE-P[latform]" represents a lease of the combined DS0 local loop, local circuit switching, and trunk-side shared transport at an aggregated TELRIC rate. Historically, such UNE-P combination has been the UNE offering often utilized by CLECs to provide their service to "mass market" customers: residential customers and small business customers using a small number of lines. The FCC's decision to remove DS0-related circuit switching (and hence derivatively the accompanying shared transport (see 47 C.F.R. § 51.319(d)(4)(C)) as a required § 251 UNE effectively ends the incumbents' obligation to provide a TELRIC-priced UNE-P offering.

[3]XO Delaware, Inc. ("XO") originally joined the emergency petition, also asserting that VZ-DE was about to breach the terms of their differing interconnection agreement. As counsel for the two CLECs explained to Staff, the issue for XO centered on the implementation of the Order of Remand's new rules pertaining to the unavailability of high capacity loops and dedicated transport as UNEs in certain circumstances. See 47 C.F.R. § 51.319(a)(4)-(5) (loops); 51.319(e) (dedicated transport) (2005). In contrast, InfoHighway's focus was on its need for the continued availability of TELRIC-priced UNE-P combinations. By counsel's letter dated March 17, 2005, XO withdrew as a party to the emergency petition. Consequently, when the matter arrived for the Commission's consideration, the arguments necessarily revolved around the FCC's directives related to local switching and hence the UNE-P combination.

customers until the carriers complete the change of law process in the interconnection contract.

2. The spark precipitating this matter came in early February 2005, when Verizon announced to CLECs that it would not accept, after March 11, 2005, CLECs' new orders for TELRIC-priced UNEs "de-listed" under the Order on Remand - including TELRIC-priced UNE-P combinations. After that date, the embedded base of UNE-P lines then being made available to CLECs would continue to be provided but would be subject to the FCC's transitional regime: a TELRIC, plus $1 rate and a total phase-out of the TELRIC UNE-P offering within one year (by March 2006).[4] To Verizon, its February notices represented implementation of the Order on Remand's directives. There, several times, the FCC had said that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market switching."[5] To VZ-DE, those directives created an immediate nationwide bar on the continued availability of new TELRIC-priced UNE-P combinations. That bar, VZ-DE asserts, not only trumps any

[4]Verizon has offered both short- and long-term alternative arrangements that mirror the UNE-P offering. Both of these "commercial" substitute offerings come at higher rates and with various conditions, or, in some cases, with additional services.

[5]Order on Remand at ¶ 5, bullet 3. See 47 C.F.R. § 51.319(d)(2)(i) (2005) ("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.") See also Order on Remand at ¶ 226 ("Because unbundled local switching will no longer be available pursuant to section 251(c)(3), we establish a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternate service arrangement"); id. at ¶ 227 ("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.").

inconsistent obligations imposed under existing interconnection agreements but also overrides any prolonged "change of law/further negotiation" provisions that might be contained in any such agreements. Those existing agreements will likely have to be modified to conform to the Order on Remand's dictates (and to incorporate the transition period requirements) but any such amendment process could not alter the language that (with the exception of the "embedded base") incumbent LECs no longer have any obligation to provide CLECs with access to TELRIC-priced mass market circuit switching.

3. To InfoHighway, Verizon's February messages to CLECs were not implementation of the Order on Remand but notices of the incumbent's impending anticipatory breach of the carriers' interconnection agreements. In InfoHighway's view, under the 1996 Act, the called-for interconnection agreements define the duties and obligations of the carriers. And when the contracting carriers agree, in "change of law" provisions written into their contract, on how any subsequent changes in the background rules will be implemented - then the carriers are contractually bound to comply with their agreed-upon process when such underlying rules do shift. Moreover, InfoHighway says, the Order on Remand's directives - including those related to local switching (and hence UNE-P combinations) - do not purport to supercede the parties' contractual commitments to a prescribed "change of law" process. One need only look to ¶ 233 of the Order on Remand. There, the FCC said that not only that it "expecte[d] that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act," but that "the incumbent LEC

and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Thus, InfoHighway argues, under the section 251/252 regime, VZ-DE cannot unilaterally stop providing declassified elements as of March 11 and must continue to provide any UNEs called for by interconnection agreements until the completion of the contracts' change of law procedures.[6] InfoHighway has an interconnection agreement with VZ-DE that sets forth a negotiation process to be instituted in the event of changes in background regulatory obligations and VZ-DE must follow such process to implement the Order on Remand directives. Until it does so, VZ-DE must provide UNE-P combinations in accord with the present terms of that contract.[7]

4. One initial difficulty is that InfoHighway's basic contract claim comes with glitches that could not be fully explored, let alone resolved, during the short period between filing and deliberations. First, the Commission notes that the "agreement" InfoHighway relies

[6]In its earlier 2003 "Triennial Review Order," the FCC had also revised the UNEs that incumbents had to make available to CLECs. In doing so, the FCC expressly declined to accede to the incumbent LECs requests that - in order to avoid delay in implementing these changes - it supersede the § 252 process and unilaterally change all interconnection agreements to have them conform to the new rules. Instead, the FCC sent the carriers off to use contractual change of law provisions or a "reverse" § 252 arbitration process to implement that Order's UNE changes. *In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd. 16978 at ¶¶ 700-06 (FCC 2003) ("Triennial Review Order").

[7]InfoHighway also asserts that VZ-DE cannot unilaterally "cut-off" continued access to the UNE-P combination given the "independent" obligation of VZ-DE to provide loops and switching under the provisions of 47 U.S.C. § 271(c)(3). Similarly, it argues that, regardless of any de-listing of local switching as a UNE, VZ-DE must continue to offer that element (and the UNE-P combination) to comply with obligations imposed on Verizon (then Bell Atlantic) as a condition for approval of its acquisition of GTE. In each instance, InfoHighway posits, the § 271 or merger obligation is encompassed as the "applicable law" - along with § 271(c)(3) unbundling - which the agreement adopts to define VZ-DE's unbundling obligations.

upon was not one directly negotiated between InfoHighway and VZ-DE. Rather, InfoHighway (for its Delaware operations) exercised its right to "opt-into" an already approved agreement between VZ-DE and another CLEC. But exactly what other agreement was so adopted is, in itself, clouded with uncertainty. This Commission's records apparently refer to InfoHighway's adoption of the "Conectiv" agreement. Yet, InfoHighway says it later adopted the "Z-Tel" agreement. VZ-DE acknowledges that InfoHighway expressed that desire, but claims that the CLEC then delayed in completing the "adoption" paperwork.[8] InfoHighway and VZ-DE quarrel over whether the delayed return scotched the adoption and, if it did not, who bears responsibility for the later failure to file notice of the adoption with the Commission. But the fact remains that - at present - this Commission's records do not now reflect any such adoption of the Z-Tel agreement.

5. In addition, VZ-DE points out that while the Z-Tel agreement does contain a "change of law" process provision (§ 4.6), it also contains another term that allows Verizon, "[n]otwithstanding anything in this Agreement to the contrary," to "discontinue the provision of any such service, payment, or benefit," if a "legislative, judicial, regulatory, or other governmental decision, order, determination or action, or any change in Applicable law" relieves Verizon of the requirement under "Applicable Law to provide

[8]The initial term of the 2001 Z-Tel agreement expired on June 1, 2003. Apparently, InfoHighway's efforts to adopt that agreement began sometime in February 2003. However, VZ-DE asserts that InfoHighway did not return the adoption paperwork to it until mid-2004.

any service, payment, or benefit . . ."[9] In such event, that term requires Verizon to provide written notice within 30 days prior to the discontinuance.[10] In similar fashion, another term in the UNE Attachment to the agreement, explicitly provides that if "Verizon provides a UNE or Combination to Z-Tel, and the Commission, the FCC, a court, or other governmental body of appropriate jurisdiction determines, or has determined, that Verizon is not required by Applicable Law to provide such UNEs or Combination, *Verizon may terminate the provision of such UNE or Combination to Z-Tel for new customers.*"[11] In the short time frame available, the Commission surely cannot come to any definitive conclusions about the interplay between the change of law provision relied upon by InfoHighway and the other contractual terms cited by VZ-De. But what is clear is that it is unclear whether the contract commits the carriers to follow the negotiation/change of law process in all instances of changes in the background rules.

6. Again, the Commission was called to decide on the emergency petition on an expedited basis, without the opportunity to develop a full, clear record or to filter the legal questions through the normal Hearing Examiner Report process. Thus, similar to the case of a court's consideration of an application for a temporary restraining order or a preliminary injunction, the Commission's ruling on

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[9] Z-Tel Agreement, § 4.7. A "service" is defined in the Agreement's incorporated glossary to encompass a "Network Element." Glossary, § 2.84.

[10] Id.

[11] § 1.5 of the incorporated "Unbundled Network Elements (UNEs) Attachment" to Z-Tel Agreement (emphasis added in quotation).

InfoHighway's request must necessarily deal not with final answers but probabilities and competing equities. Is there a reasonable likelihood that InfoHighway's interpretation of the Order on Remand would prevail if this matter was fully litigated? Similarly, is there a reasonable probability that its contractual theory would similarly be found to be the correct one? And what is the prevailing equity in this matter - not only as to balancing the "harms" that might flow to each carrier but the furtherance of the public interest.

7. At its meeting on March 22, the Commission withheld the immediate affirmative relief sought by InfoHighway (and thus denied its Emergency Petition) for several reasons. First, it is not immediately clear, on the abbreviated record, that InfoHighway has a reasonable likelihood of prevailing on its claim that VZ-DE has a continuing contractual obligation to provide InfoHighway access to the UNE-P combination to serve new (post March 11th) customers of InfoHighway. In their submissions, both InfoHighway and VZ-DE provided the Commission with copies of decisions from other state commissions which had already come down on one side or another of the question whether the Order on Remand's directives as to local switching (and hence UNE-P) were self-effectuating and superceding, or meant to be implemented by existing contractual change of law provisions. If one simply nose-counts those decisions, it may be that VZ-DE's position holds a slight edge - at least in the context of the obligation to continue to provide UNE-P combinations to serve new customers. This Commission need not (and indeed does not) now make any final definitive ruling on what the FCC intended in ¶ 233 of the

Order on Remand in the context of new UNE-P orders for new customers sought under existing interconnection agreements. It is enough to say that InfoHighway's presentation now comes up short of establishing a reasonable probability that it has the winning argument. The language VZ-DE quotes from the Order on Remand surely leans toward a view that the FCC intended a quick end to further provisioning of new UNE-P combinations for new customers.

8. Second, as noted above, uncertainty surrounds the heart of InfoHighway's claim - that it has a "contractual" right to continue to order UNE-P combinations for *new* customers until the end of the change of law process. Even assuming that the Z-Tel agreement is now the governing "adopted" contract, VZ-DE has pointed to other terms in that agreement which seem to allow Verizon to discontinue providing services and UNE combinations simply on notice in the event of later shifts in FCC rules or later judicial rulings related to the availability of such services or elements. Those other contractual provisions lead one to reasonably question whether the contract's change of law provision applies in all instances, and in particular to those instances of where once available UNEs are, by later rule change "removed" from the § 251(c)(3) list. Again, the uncertainty about not only what contract governs, but what process, if any, the contract calls for in this type of situation tilts against granting immediate emergency relief to InfoHighway.

9. Third, and maybe most importantly, the Commission cannot ignore the "transitional" directives also contained in the Order on Remand. The FCC has decreed that, at the end of the one-year

transition period (March 11, 2006), incumbents need not continue to provide *any* TELRIC-priced mass market local switching (and hence UNE-P combinations) to CLECs to serve any customer, whether the customer might be labeled *new* (post-March 2005) or *embedded* (pre-March 2005).[12] And everyone seemingly agrees that this directive trumps any contrary contractual language in then existing interconnection agreements. Under it, if change of law procedures are contractually required, they must be completed before then, not starting then. And, given the short time frame, the FCC surely desires that CLECs move quickly in developing alternative service arrangements for those embedded CLEC customers which will be served (during the transitional period) by the TELRIC plus $1 priced UNE-P combination. The entire thrust of the FCC transitional scheme, this Commission thinks, is that sooner is better than later for migrating present UNE-P customers to services provided by such alternative arrangements. Given that, the Commission thinks the energies of the CLECs necessarily must turn to finding those alternative arrangements (whether it be another commercial agreement with VZ-DE, the use of resale (§ 251(c)(4)), or the use of its own infrastructure (packet switches). The sooner the alternative arrangements are brought into play, the quicker the CLECs *new* customers can be served under those arrangements, rather than looking to TELRIC-priced UNE-P service now but with an inevitable change in less than 12 months. It might be that the alternative arrangements may be more costly to the CLEC. But, under any scenario, the CLECs,

[12] 47 C.F.R. § 51.319(d)(2)(i)-(iii) (2005).

if they choose to continue to serve any customers, will face those increases in March 2006. The FCC's transitional scheme was meant to ease the migration, not to postpone the inevitable.[13]

10. The Commission also must mention the timing of InfoHighway's emergency petition. The decisional outline of the Order on Remand was announced in December 2004. At that time, it was known that mass market local switching was to be de-listed as a UNE and that

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[13]Similarly, the Commission is not convinced that InfoHighway has a winner in its assertion that the "checklist" provisions of 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) represent additional "applicable law" under the Z-Tel agreement which would then require VZ-DE to continue to provide the UNE-P combination to serve its new customers. This claim was asserted, but not fully fleshed out, in the parties' arguments. The Commission (based on its counsel's representation) notes that the FCC has indeed determined that the provisions of 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) do impose obligations on BOCs (such as VZ-DE) to provide unbundled local loops, local transport, and local switching "independent" of whether any similar unbundling is, or is not, required under § 251(c)(3). Triennial Review Order at ¶¶ 653-55. Yet, the FCC has said that these checklist obligations do not come accompanied with TELRIC pricing nor are they subject to the same "combination" requirements which surround the unbundling regime under § 251(c)(3). Id. at ¶¶ 656-64 (pricing) & ¶ 655 n. 1989 (combinations). See also United States Telecom Ass'n. v. FCC, 359 F.3d 554, 588-590 (D.C. Cir. 2004) (affirming distinctions drawn by FCC). Thus, there are significant questions (here largely unexplored) whether VZ-DE's § 271 loop, switching, and transport checklist obligations) (either standing alone or as incorporated contractual "applicable law") would continue to require the provision of UNE-P combinations.

InfoHighway's other contention is that the UNE-P combination must continue to be offered because of conditions imposed on Verizon, then Bell Atlantic, under its takeover of GTE. Numerous CLECs made the identical assertion in response to VZ-DE's efforts in PSC Dckt. No. 04-68 to implement the changes to various UNE offerings directed by the FCC's 2003 Triennial Review Order. There, VZ-DE responded that such an argument misreads the nature of the merger conditions and that, in any event, such conditions had by then already expired. In PSC Order No. 6419 (May 18, 2004), this Commission strongly suggested, if not directed, the CLECs to take their claim (and VZ-DE's defense) to the FCC, the agency that had initially imposed the merger conditions. Counsel tells the Commission that 37 CLECs did, in September 2004, present a petition to the FCC (CC Dckt. No. 98-184) asking for a declaratory ruling on the continued vitality of the particular merger conditions and their interplay with the changes in UNE obligations wrought by the Triennial Review Order. So far, the FCC has not responded to that petition in the context of either the 2003 Triennial Review Order or the later Order on Remand. The FCC's apparent disinterest in providing prompt answers to the merger condition questions suggests that this state agency should hesitate to now go about enforcing any merger condition in the present situation.

competitive LECS would not (except under the transition regime) be able to add new switching UNES.[14] And while the Order on Remand decision did in fact reverse the FCC's prior, long-standing view that local switching (and hence the UNE-P combination), was a UNE that had to be offered by incumbents, the FCC had forewarned in its August 2004 "Interim Order," that such a shift was a real possibility.[15] While InfoHighway may not have earlier anticipated the "hard-line" that VZ-DE later took on the March 11th cut-off date, it was surely on notice that changes to the availability of TELRIC-priced UNE-P combinations were afoot.[16] A filing before March 7 might have given this Commission more time to build a better record, require more structured submissions, and to consider the arguments.

11. Lastly, the Commission emphasizes the limits of this decision. At its meeting on March 22, the Commission's ultimate ruling was premised on how this matter was presented to it. Thus, the arguments the Commission heard focused on InfoHighway's ability to

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[14]See "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers," 2004 WL 29130101 (FCC press release Dec. 15, 2004).

[15]*In the Matter of: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 19 FCC Rcd. 16783 at ¶ 22 (FCC Aug. 20, 2004).

[16]The Commission also notes that InfoHighway was originally a party to the "arbitration" proceedings sought by VZ-DE to implement the 2003 Triennial Review Order. PSC Dckt No. 04-68. In that proceeding, VZ-DE eventually dismissed InfoHighway, as well as other CLECs, as parties. It did on the basis that its governing agreement with those CLECs allowed "changes" wrought by the Triennial Review Order's UNE changes to be made on "notice" rather than through a change of law process. While the Commission did not necessarily accept VZ-DE's reading of any of those contracts' terms on this issue (see PSC Order No. 6539 (Jan. 11, 2005)), VZ-DE's assertions surely sent a message to the eventually dismissed CLECs, such as InfoHighway. It said that VZ-DE would contest the applicability of any change of law provision in the case of any delisted UNE.

continue to obtain TELRIC-priced UNE-P combinations to serve its *new* customers in Delaware. Counsel's exchanges did not reach to the slightly different question about the continued availability of additional or relocated UNE-P combinations to serve InfoHighway's existing (March 11) 670-line Delaware customer base. In fact, the truncated record contains nothing about that scenario in the context of the CLEC's existing Delaware customers. We do not decide that issue here. It might require looking to other language in both the Order on Remand and the Z-Tel agreement.[17] Moreover, that situation might present different equities - the CLECs ability to hold onto existing customers versus its opportunity to acquire new customers. The Commission's deliberations on March 22 and this Order do not pretend to resolve that issue on a record devoid of facts and argument. In addition, as said twice before, the Commission's decision here was rendered in the context of an "emergency" petition seeking immediate relief. It was reached on a truncated record without a structure for extended presentation of the issues. And it was rendered to speak to a single complaint seeking relief under a single contract. Given those limitations, the Commission reserves the right to revisit the issue (but not necessarily this emergency ruling) in the case of other interconnection agreements or in light of later judicial rulings or other FCC directives.

[17]For example, one of the contractual terms cited by VZ-DE speaks to VZ-DE's right, in cases of changes in law, to terminate the provision of UNEs or combinations "for new customers." See ¶ 5 & n. 11 above. That contractual term then goes on to define a six-month transition period to move existing carriers off the terminated UNE.

Now, therefore, **IT IS ORDERED:**

1. For the reasons set forth in the Body of this Order, the Commission denies the "Petition for an Emergency Declaratory Ruling" filed by A.R.C. Networks, Inc. (d/b/a InfoHighway Communications) filed March 7, 2005.

2. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

STATE OF INDIANA

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FILED

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INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS	))))))	**CAUSE NO. 42749**

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. **Background**. On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc, Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform[1] ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").[2]

[1] The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. **Joint CLECs' Position**. Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996[3] ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*[4] require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

[3] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[4] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. **SBC Indiana's Position**. SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. **The TRRO**. In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order[5] ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut[6] processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

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[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

[6] The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. The TRRO's Reasoning for Eliminating UNE-P. In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

> . . . . not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.[7]

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

> Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

[7] *TRRO*, ¶ 199.

> competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.[8]

6. **Discussion and Findings**. As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."[9] This determination in the TRRO is then incorporated in the accompanying FCC rules: "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."[10]

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and

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[8] *Id.* at ¶¶ 218, 220.

[9] *Id.* at ¶ 199.

[10] 47 C.F.R. § 51.319(d)(2)(i).

> does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[11]

Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10th customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."[12]

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

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[11] *TRRO*, ¶ 199:

[12] Motion, p. 10.

existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P. Of course, ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service.

As noted above, the TRRO creates the transition period by stating: "Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[13] The effective date of the TRRO is March 11, 2005. The FCC then goes on to state: "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."[14] We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded customer base, CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.

Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.[15]

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

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[13] *TRRO*, ¶ 199.

[14] *Id.*

[15] *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that ". . . if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."[16] We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.[17] We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

[16] *Motion*, p. 9.

[17] 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-9-05

Date

STATE OF MARYLAND

PUBLIC SERVICE COMMISSION

ML# 96341

March 10, 2005

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Re: Emergency Petition of MCI for a Commission Order Directing Verizon to Continue to accept New Unbundled Network Element Platform Orders

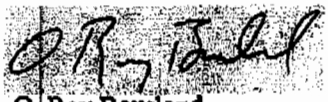
Dear Counsel:

On March 1, 2005, MCImetro Access Transmission Services, LLC ("MCI") petitioned the Public Service Commission ("Commission") for an order directing Verizon Maryland Inc. ("Verizon") to comply with the "change of law" provisions contained in the parties' interconnection agreement ("ICA"). Furthermore, MCI seeks a directive to Verizon that it continue to accept and process unbundled network element platform ("UNE-P") orders until such time as it has concluded the change of law process. On March 7, 2005, a Petition to Intervene and Comments in Support of MCI's Emergency Petition was filed on behalf of Allegiance Telecom of Maryland, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, SNiP LiNK LLC, and XO Maryland LLC (hereinafter referred to collectively as "Petition Supporters"). On March 8, 2005, Verizon filed its Opposition to the Emergency Petition of MCI. Subsequently, on March 10, 2005, MCI filed a letter withdrawing, without prejudice, its Emergency Petition stating that it had reached a commercial agreement with Verizon that resolved the issue raised in its Petition.

As a general matter, the Commission is pleased to see parties resolve their differences outside of formal adjudication. The Commission encourages the parties to continue to work together in the future to similarly address disputes that may arise. MCI's request to withdraw its Emergency Petition is hereby granted.

With respect to the Petition Supporters, the Commission notes that given MCI's withdrawal of its Petition, the issue of intervention becomes moot. As such, the Commission hereby denies the request of the Petition Supporters to intervene in the MCI/Verizon interconnection agreement dispute. To the extent the Petition Supporters believe that their specific interconnection agreements, or the *Triennial Review Remand Order*[1] itself, do not support any proposed action of Verizon the Petition Supporters may file individualized petitions based upon their particular interconnection agreements and specific provisions of the *Triennial Review Remand Order* for the Commission's consideration. For this purpose, the Commission will designate Case No. 9026 as the vehicle for parties to file such petition. Additionally, the Commission would remind MCI, Verizon and the Petition Supporters that the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules, including those specifying the procedures to be employed when orders for unbundled loops or transport are disputed. At this point in time, the Commission is not aware of any actual disputes regarding loop or transport orders. If any such disputes arise, Verizon and the ordering carrier are directed to abide by the FCC's direction in the *Triennial Review Remand Order* to fill the order and to then bring the dispute to the Commission, which will resolve the matter expeditiously. We note in this regard Paragraph 234 of the *Triennial Review Remand Order* which provides that "the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."

By Direction of the Commission,



O. Ray Bourland
Executive Secretary

Andrea Pruitt Edmonds, Esquire, Counsel for Petition Supporters
Parties of Record, Case No. 9026

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

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-33 July 14, 2005

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order

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ARBITRATION ORDER

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transport portion of DS1 loop-transport EELs (CCC Brief at 31). CCC argues that the FCC limited CLECs to 10 DS1 loops per building, but if the cap is applied to EELs then CLECs will only be able to obtain 10 DS1 combinations in an entire rate center (id. at 32).

f. Conversent

Conversent argues that the Amendment should specify Verizon's unbundling obligations for high capacity loops and dedicated transport during the transition period (Conversent Brief at 12, 14). For example, Conversent agrees that Verizon is permitted to back-bill CLECs the transition rate for high capacity loops that existed as of March 11, 2005, but argues that Verizon should not be permitted to assess a late payment charge on these true-up bills as long as CLECs pay the bills within the customary deadline (id. at 11, 12). Conversent also argues that the Amendment should correctly reflect the FCC's policy on DS1 dedicated transport caps, and state that CLECs are limited to ten DS1 dedicated transport circuits only on those routes where DS3 dedicated transport unbundling is not required (id. at 14). Conversent argues that the New York Public Service Commission ("NYPSC") recently ruled that the DS1 dedicated transport cap applies only on routes where DS3 dedicated transport is not required to be unbundled, and required Verizon to amend its tariff accordingly (id.).

Conversent argues that Verizon misunderstands its position on the application of transition provisions to high capacity loops (Conversent Reply Brief at 4). Conversent argues that its proposal correctly reflects the application of the transition terms to all DS1 and DS3 loops in non-impaired wire centers, and to DS1 and DS3 loops above the applicable caps in impaired rate centers (id. at 4, 5).

Conversent argues that the Amendment should state that there is no analogous access service to dark fiber dedicated transport and dark fiber loops, and that Verizon is therefore required to submit a tariff for a substitute for dark fiber loops and dedicated transport, at just and reasonable rates which reflect only the features that CLECs obtained via dark fiber (Conversent Brief at 15, 16, 18).

3. Analysis and Findings

a. Transition Plan

There is no dispute that the effective date of the Triennial Review Remand Order was March 11, 2005. Triennial Review Remand Order at ¶ 235. There is some disagreement, however, as to whether the new unbundling rules were self-effectuating as of that date, or whether the rules only become effective after the parties update their interconnection agreements to reflect the new unbundling regime. The question is an important one, as the effective date of the rules determines the date after which CLECs are no longer entitled to new delisted UNE arrangements ("new adds"), and also determines that date on which CLECs' "embedded bases" are determined for the purpose of the transition period. For the reasons discussed below, the Department determines that the transition period began on March 11, 2005, and the CLECs' embedded bases consist of arrangements in place as of that date.

Our determination begins with a review of the relevant rules. The rules governing the transition periods and bans on new adds for switching, loops, and transport are sufficiently similar that we will confine our discussion to the example of switching; but our reasoning and

conclusion concerns loops and transport, too. With respect to local circuit switching, 47 C.F.R. § 51.319(d)(2) provides as follows:

> (i) 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.
>
> . . . .
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element.

It is clear from the text of the rule that the FCC eliminates the general obligation to unbundle local circuit switching. See 47 C.F.R. § 51.319(d)(2)(i). The FCC does, however, make a limited exception for continued access to unbundled switching at transitional rates to serve a CLEC's "embedded base of end-user customers," beginning on the effective date of the Triennial Review Remand Order and ending 12 months later. See 47 C.F.R. § 51.319(d)(2)(iii). The rule concludes by stating that CLECs "may not obtain new local switching as an unbundled network element." Id.

A review of the text of the Triennial Review Remand Order for additional discussion of the new rules reveals a similar pattern. The FCC states repeatedly and unequivocally that the

transition period applies only to the embedded base, and that CLECs are not entitled to new delisted UNE arrangements. "These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment." Triennial Review Remand Order at ¶¶ 5, 142. "These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment." Id. at ¶¶ 5, 195. "This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs." Id. at ¶¶ 5, 227.

AT&T and Conversent interpret the Triennial Review Remand Order to prohibit new delisted UNEs after March 11, 2005, and have proposed Amendments consistent with this interpretation (AT&T Brief at 12, 29; AT&T Reply Brief at 7; Conversent Brief at 11). The argument for an effective date other than March 11, 2005 focuses largely on the Triennial Review Remand Order's discussion of the parties' obligation to amend their interconnection agreements, especially paragraph 233 of the Triennial Review Remand Order, which states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, 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 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Triennial Review Remand Order at ¶ 233 (emphasis added).

While the FCC expected that parties would amend their interconnection agreements to reflect the new rules, there is nothing in the rules or the text of the Triennial Review Remand Order to suggest that the effectiveness of the new unbundling regime is to be held in abeyance pending the amendment of the parties' interconnection agreements. Such a result would be contrary to the plain language of the rules, which explicitly launch the transition period on the effective date of the Triennial Review Remand Order. The applicable law changed on March 11, 2005; the inevitable lagtime in consequent contract redrafting cannot vitiate or retard the effect of that simple fact. Witness that the FCC requires that delisted UNEs be trued-up to the transition rate after parties have amended their agreements. See Triennial Review Remand Order at ¶¶ 145 n.408, 198 n.524, 228 n.630. There would be no need for the FCC to require the embedded base of delisted UNEs to be trued-up to the transition rate at the end of the change of law process unless the FCC intended the rules to have real, consequential effect as of March 11, 2005. If the transition period did not begin (and the embedded base were not defined) until the parties complete their change of law process, there would have been nothing to true up. Furthermore, if the FCC had intended the transition period and ban on new adds to begin on a date other than the effective date of the Triennial Review Remand Order for certain CLECs based on the change of law provisions in those CLECs' interconnection agreements, it could and likely would have said so. It did not. As discussed above, what the FCC did say, repeatedly and with clarity, was that the embedded base is determined, and the transition period begins, on the effective date of the Triennial Review Remand Order, which was March 11, 2005.

Because the FCC intended the transition period to begin on March 11, 2005, all rates for the network elements delisted by the Triennial Review Remand Order shall be trued up to the applicable transition rate on and after March 11, 2005. If any CLECs have received new delisted UNE arrangements on or after March 11, 2005, those new arrangements will not be considered part of the embedded base and are not eligible for transitional pricing.[36]

The Department determines that all parties have adequate advance notice of the end of transitional pricing, as transitional pricing is limited to the duration of the transition period, which sunsets on a date certain pursuant to federal law. See e.g., 47 C.F.R. § 51.319(d)(2)(iii). Therefore, Verizon is not required to send advance notice concerning the end of transitional pricing, but may immediately re-price the embedded base to commercial rates upon the migration of a CLEC's embedded base to alternative arrangements or upon the expiration of the transition period, whichever occurs first.

However, because the FCC permits transition rates to the embedded base of UNE arrangements to remain in effect through March 11, 2006, we are aware of the perverse incentive that the CLECs will have to delay placing conversion orders until the end of the transition period in order to benefit from the lower transition rates. In the interest of

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[36] In its February 10, 2005 Industry Letter, Verizon notified the CLEC community that Verizon would re-price CLECs' embedded bases of delisted UNEs to the transition rate on March 11, 2005, retroactively if necessary. In addition, Verizon notified CLECs that they could not submit orders for new delisted UNE arrangements for completion on or after March 11, 2005. Because Verizon declined to provision new delisted UNE arrangements after that date and repriced arrangements that were not migrated to alternate arrangements or replacement arrangements, there may in fact be nothing to true up.

administrative efficiency and consistent with the FCC's rules, the Department determines that CLECs are permitted to place orders converting UNEs to alternative arrangements at any time during the transition period but to have the orders not take effect until the end of the transition period.

Concerning the FCC's directive to LECs to conform their interconnection agreements to the requirements of the Triennial Review Remand Order, it is clear that the FCC did not intend that negotiations to comply with that directive should erode the one-year transition period or extend the life of an abandoned rate regime beyond March 11, 2006. Accordingly, the Department directs parties to submit contract language (including such definitions as the parties may agree are necessary) consistent with the determinations in this section. The simplest course for parties may be simply to import the portions of the rules addressing the transition period into their agreements and to provide explicit sunset dates. Parties shall not add any additional elements, such as entrance facilities, which the FCC excluded from the dedicated transport transition plan, see Triennial Review Remand Order at ¶ 141 n.395; 47 C.F.R. § 51.319(e)(2), or operational conditions to the FCC's transition plan.

b. Moves, adds, changes

We determine that additional lines, moves, or changes are not included in the "embedded base" for which CLECs may obtain transition pricing.[37] The FCC created a

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[37] The FCC's transition period pricing is as follows: 115 percent of the rate the requesting carrier paid on June 15, 2004 for loops and transport; and the rate the requesting carrier paid on June 15, 2004 plus one dollar for UNE-P. Triennial Review Remand Order at ¶¶ 145, 198, 228.

transition period to allow CLECs sufficient time to move their embedded bases to alternative arrangements, but once the embedded base is defined it may not continue to grow through additional lines, moves, changes, or new customers. Such a result would be contrary to the FCC's rules, which clearly state that CLECs may not obtain new delisted UNE arrangements. See e.g., 47 C.F.R. § 51.319(d)(2)(iii).

The exclusion of moves, adds, and changes from a CLEC's embedded base does not mean that the CLEC's end user customers are prevented from requesting service changes until the embedded base is migrated to alternative arrangements; rather, the CLEC will be required to pay the market rate for any new arrangements added on behalf of their customers.

c. Loop/Transport Caps

CCC and Conversent argue that there is a conflict between the text of the Triennial Review Remand Order and the final rules regarding the application of the DS1 transport cap, and that the Amendment should reflect the FCC's policy determinations as expressed in the text of the Triennial Review Remand Order (CCC Reply Brief at 17; Conversent Brief at 14). Specifically, they argue that the text of the Triennial Review Remand Order, which caps DS1 transport "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport," conflicts with the FCC's rules, which apply the cap to "each route where DS1 dedicated transport is available on an unbundled basis" regardless of whether DS3 transport is unbundled. Compare Triennial Review Remand Order at ¶ 128 with 47 C.F.R. § 51.319(e)(2)(ii)(B).

April 22, 2005

Ms. Lisa M. Thorne
Vice President – New Hampshire
Verizon
990 Elm Street, Floor 19
Manchester, New Hampshire 03101

Re: Docket No. DT 05-034
Revisions to Tariff No. NHPUC 84

Dear Ms. Thorne:

This is to advise that, pursuant to RSA 378:6, IV and the Commission's secretarial letter of March 11, 2005, the tariff revisions filed by Verizon in the above-referenced docket will become effective by operation of law, except for the provision regarding dark fiber loop, which is discussed below. In accordance with the Federal Communications Commission's Triennial Review Remand Order issued February 4, 2005, the proposed tariff changes, except those pertaining to dark fiber loop, are effective March 11, 2005.

The time constraints imposed by RSA 378:6, IV, combined with the tools available under the statute, i.e., amendment, rejection or approval, are not conducive to the depth of review needed for changes of the scope and complexity posed in this case. The scope and complexity of the tariff changes under consideration here would in the best of circumstances be subject to suspension to allow a thorough examination.

Given the options available, however, the Commission has determined that it is not feasible under the circumstances to amend the filing in a way that the Commission would be reasonably assured would prevent unintended consequences. Consequently, left with a choice between rejecting the filing in whole or allowing the filing to take effect, the Commission has determined that the better course, taking into account the Triennial Review Remand Order and the various comments received in this docket, is to allow most of the changes to take effect and to initiate a separate proceeding as discussed below.

The Commission has determined, in exercising its authority under RSA 365:5, to open a new docket for the purpose of conducting an investigation of certain issues that are raised by your February 22, 2005 tariff filing. Those issues include identification of the wire centers at which Verizon is no longer required to provision DS1 and/or DS3 loops and dedicated high-capacity transport facilities (including dark fiber transport) to competitive local exchange carriers pursuant to the *TRO Remand Order* of the Federal Communications Commission, *see Triennial Review Remand Order*, 2005 WL 289015 (F.C.C., Feb. 4, 2005) at ¶¶ 111-124 and 166-181.

Finally, the Commission has determined, consistent with the case-by-case analysis established in Order No. 24,442 in Docket No. DT 03-201, and the FCC's New Hampshire Section 271 Order, at paragraph 118, that dark fiber loop is a checklist item 4 commitment. Consequently, the dark fiber loop tariff changes are rejected and Verizon must continue to provide dark fiber loop in the manner described in Order No. 24,442. Appropriate tariff pages should be filed referencing this proceeding and reflecting the effective date of March 11, 2005.

Sincerely,

Debra A. Howland
Executive Director and Secretary

Cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: EMERGENCY PETITION FOR DECLARATORY RELIEF DIRECTING VERIZON TO PROVISION CERTAIN UNES AND UNE COMBINATIONS	:	DOCKET NO. 3668

REPORT AND ORDER

I. PETITION

On March 7, 2005, Broadview Network, Inc., Broadview NP Acquisition Corp., Info Highway Communications, and DSCI Corporation ("Petitioners") filed a petition for emergency declaratory relief to prevent Verizon-Rhode Island ("VZ-RI") from breaching its interconnection agreements ("ICAs") with the Petitioners for prematurely refusing to provision certain unbundled network elements ("UNEs") and UNE combinations. Specifically, VZ-RI has informed all competitive local exchange carriers ("CLECs") that VZ-RI will reject Unbundled Network Element Platform ("UNE-P") orders due on and after March 11, 2005 as well as orders for dedicated DSI and DS3 transport, and DSI and DS3 high capacity loops within certain wire centers as indicated by the FCC's Triennial Review Remand Order ("TRRO").[1]

The Petitioners argued that the rights of CLECs to obtain UNEs pursuant to section 251 of the Telecommunications Act of 1996 ("Telco Act") is governed by ICAs negotiated and arbitrated pursuant to section 252 of the Telco Act. In addition, the Petitioners emphasized that VZ-RI can only modify its obligation to provision UNEs to CLECs by amending its ICAs. The Petitioner indicated that VZ-RI has not negotiated in good faith with the CLECs to implement the TRRO. The Petitioners opined that VZ-RI's

[1] Emergency Petition for Declaratory Relief, pp. 1-4.

obligation to provision UNEs and UNE combinations is based not only on Section 251 of the Telco Act but also upon applicable law, which includes the Bell Atlantic-GTE merger conditions, Section 271 of the Telco Act, and state law. Furthermore, the Petitioners stressed that VZ-RI should continue to provision all UNEs and UNE combinations until it has changed its ICAs by effectuating the changes in law resulting from the TRRO. In addition, the Petitioners maintained that VZ-RI must make unbundled loops, transport and local switching available to CLECs pursuant to Section 271 of the Telco Act. In conclusion, the Petitioners requested that the Commission order VZ-RI to continue provisioning UNEs and UNE combinations under the rates and terms of its ICAs and comply with the change of law provisions of its ICAs with regard to implementing the TRRO.[2]

II. VZ-RI's OPPOSITION

On March 11, 2005, VZ-RI filed an opposition to the Petitioners' request for emergency declaratory relief. VZ-RI indicated that the Petitioner failed to demonstrate they are likely to suffer any irreparable harm. VZ-RI stated that, after March 11, 2005, CLECs can obtain switching for new orders through commercial agreements or resale. Also, after March 11, 2005, VZ-RI explained that for a loop or transport, in non-UNE eligible wire centers, CLECs can obtain the loop or transport by certifying under the TRRO its availability after a diligent inquiry, and for high capacity loops or dedicated transport, CLECs may order special access service. Thus, VZ-RI argued the only harm

[2] Id., pp. 4-12. On March 10, 2005, the Petitioners submitted a letter indicating that the state regulatory commissions in Illinois, Michigan, Georgia and Alabama had granted petitions to require Regional Bell Operating Companies ("RBOCs") to continue offering UNEs and UNE combinations under the CLECs' current ICAs.

to CLECs is paying more for service than they now pay at TELRIC rates and these money damages alone cannot constitute irreparable harm.[3]

VZ-RI argued that the FCC's TRRO clearly prohibits new orders for discontinued UNEs as of March 11, 2005. VZ-RI explained that the FCC ordered this clear deadline because of the D.C. Circuit Court's decision to vacate the FCC's UNE rules adopted in the FCC's Triennial Review Order ("TRO"). Accordingly, VZ-RI maintained that unlike the TRO, the prohibition on new orders for discontinued UNEs was not left to implementation through the change-of-law provisions of ICAs.[4]

In regard to the Petitioners' ICAs, VZ-RI noted that two of the four Petitioners, Broadview Networks and Broadview NP Acquisition Corp, have ICAs specifically citing the D.C. Circuit's recent decision and the FCC's UNE rules as the basis of VZ-RI's UNE obligations. Also, the ICAs for all four Petitioners state that VZ-RI must provide UNEs only to the extent required by applicable law, which according to VZ-RI, in these circumstances, is the FCC's TRRO. In addition, VZ-RI argued that state regulatory commissions cannot stay the effect of the FCC's TRRO because of preemption. Lastly, in regards to Section 271 of the Telco Act, VZ-RI stressed that the interpretation and enforcement of Section 271 is the exclusive province of the FCC.[5]

At an open meeting on March 24, 2005, the Commission reviewed the pleadings and denied the Petitioners request for emergency declaratory relief requiring VZ-RI to provision certain UNEs and UNE combinations.

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[3] VZ-RI's Opposition, pp. 8-9.
[4] Id., pp. 9-16.
[5] Id., pp. 16-24.

COMMISSION FINDINGS

The CLECs in this case have labeled their petition an emergency. The Petitioners are essentially seeking a temporary restraining order on VZ-RI to prevent it from following the FCC's TRRO. Under R.I. Civil Procedure Rule 65, a party seeking a temporary restraining order must demonstrate "immediate and irreparable injury." In this case, VZ-RI will continue to provision to CLECs their current switching arrangements as well as their current transport and loops at wire centers which no longer meet the thresholds of the FCC's TRRO, albeit at the higher transitional rates.[6] Furthermore, for new switching arrangements or new transport or loops which do not meet the FCC's new criteria, the CLECs can obtain access to these network facilities by entering into a commercial agreement with VZ-RI or by ordering through resale or special access services, although at rates higher than TELRIC. This is not an argument of providing wholesale services or disrupting the services of current customers, but of CLECs paying more for wholesale services in order for them to service their current customers and obtain new customers. The damages VZ-RI could inflict on these CLECs would be monetary in nature and "monetary damages will ordinarily not invite injunctive relief."[7] A business entity needing to pay some more money for a wholesale service is not an emergency. On the contrary, it is a common, everyday business occurrence.

Notwithstanding that the Petitioners have failed to demonstrate immediate and irreparable harm, the Commission will review the legal merits of this petition. The Petitioners cleverly worded request is that VZ-RI continues provisioning UNEs under the terms of their ICAs. This is a reasonable request but the CLECs' interpretation of their

[6] See e.g. FCC Rules 51.319 (a)(4)(iii), 51.319 (d)(2)(iii), and 51.319 (e)(2)(iii)(C).
[7] In re State Employees Union, 587 A.2d 919, 926 (1991).

ICAs is not. Two of the four ICAs, in question, specifically state that the ICA "does not include adoption of any provision imposing an unbundling obligation on Verizon that no longer applies to Verizon under ... the decision of the U.S. Court of Appeals for the D.C. Circuit in the Opinion and Order in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II") or that is otherwise not required by both 47 U.S.C. Section 251 (c) (3) and 47 C.F.R. Part 51." The FCC's TRRO made it clear that VZ-RI is no longer required to provide certain UNEs under Section 251 of the Telco Act, and the FCC's UNE Rules are encompassed in 47 C.F.R. Part 51. Furthermore, all four ICAs in question require "compliance with applicable law", which is defined as "all effective laws, government regulations and government orders." The FCC's TRRO and new UNE rules are applicable law in telecommunications.

As for state law, the FCC has clearly indicated that in regard to UNE obligations it would be "unlikely" that a state commission decision which contradicts the FCC's UNE Rules "would fail to conflict" with federal law and would, therefore, be preempted.[8] This Commission has already declared it "should not attempt to exercise its authority if it is likely to be preempted."[9] Under these circumstances, there is no valid state law requirement in Rhode Island which requires VZ-RI to provide switching, or transport and loops at non-UNE eligible wire centers at TELRIC rates.

In regards to other federal legal obligations, the Commission has already indicated that determinations related to Section 271 of the Telco Act "should be made by the

[8] TRO para. 195.
[9] Order No. 18017.

FCC."[10] The issue of an RBOC's obligations under Section 271 regarding switching has been an issue of contention for some time and since Section 271 is a federal statute, it is inherently logical to have the FCC interpret this statute. Furthermore, there is no pressing need for this Commission to attempt to interpret Section 271 because the CLECs will continue to have access to VZ-RI's network facilities albeit at rates higher than TELRIC for some of these facilities. If these rates are not just and reasonable, the CLECs should petition the FCC immediately for relief. As for VZ's obligation under the FCC's Bell Atlantic/GTE Merger Order, the Commission Arbitrator has determined that the "the sun has set on VZ's obligation to provide UNEs under the Bell Atlantic/GTE Merger Order."[11] At this time, the Commission finds no reason to disagree with the Arbitrator's decision.

Even if VZ-RI is no longer required by law to provision certain UNEs, the issue remains as to whether VZ-RI has complied with the change of law provisions of their ICAs. Generally, compliance with an ICA's change of law provision is necessary to effectuate a change of law. VZ-RI has indicated that it provided the four CLECs with thirty days written notice of the discontinuation of the UNEs as required by the pertinent ICAs.

In any case, the change of law provision of an ICA cannot supersede or render impotent an express and immediate mandate by the FCC. Under the FCC's TRO, the FCC directed all carriers to negotiate and arbitrate all issues arising from the TRO through the Section 252 process of the Telco Act.[12] However, with the cloud of the D.C. Circuit Court's vacatur of the FCC's UNE Rules, the TRRO implemented on March 11,

[10] Id.
[11] Order No. 17802.
[12] TRO para. 701.

2005 new UNE Rules with transition periods for the discontinued UNEs serving the CLEC's embedded customer base.[13] Admittedly, in paragraph 233 of the TRRO, the FCC does reference its expectation that carriers will, through the Section 252 process, "implement our rule changes." However, assuming this provision conflicts with other provisions of the TRRO, it is a well established rule of interpretation that the specific provision prevails over the general provision.[14] In the TRRO, there are numerous specific provisions where the FCC states that the transition for the CLECs' embedded customer base being served by discontinued UNEs is "beginning on the effective date of the Triennial Review Remand Order", which is March 11, 2005.[15]

This Commission must presume that the FCC is logical. It would be illogical to begin a transition period for discontinued UNEs serving the CLECs' embedded customer base on a specific date, but allow CLECs to obtain these same discontinued UNEs for new customers during the transition period. If the FCC had remained silent on a specific date for beginning the transition period for the CLECs' embedded customer base, a different interpretation could have been reached.

At times, the law amounts to no more than the commands of a sovereign.[16] By enacting the Telecommunications Act of 1996, the federal government has made itself, to a large extent, sovereign over local telecommunications competition.[17] The FCC's TRRO is the sovereign's command.[18] The petition is denied.

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[13] TRRO paras. 145, 198 and 227.
[14] R.I.G.L. §43-3-26.
[15] FCC UNE Rules 51.319(a)(4)(iii), 51.319(a)(5)(iii), 51.319(a)(6)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C), 51.319(e)(2)(iii)(C), and 51.319(e)(2)(iv)(B).
[16] See John Austin, The Province of Jurisprudence Determined (1832).
[17] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6 (1999).
[18] The Petitioners noted on March 10, 2005 that four state regulatory commissions had granted their request for emergency declaratory relief. Since then, the Alabama, Illinois and Michigan commissions have reversed themselves regarding the CLECs right to receive UNE-P for new customers after March 11, 2005.

Accordingly, it is

(18281) ORDERED:

1. The Petition for Emergency Declaratory Relief filed on March 7, 2005 is hereby denied.

EFFECTIVE IN WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON MARCH 24, 2005. WRITTEN ORDER ISSUED JUNE 16 , 2005.

Elia Germani, Chairman

Robert B. Holbrook, Commissioner

See Alabama PSC's Order in Docket 29393 (issued 5/25/05), Illinois C.C.'s Amendatory Orders in Docket 05-0154, 05-0156, and 05-0174 (issued 3/23/05), and Michigan PSC's Order in Case Nos. U-14303, 14305, 14327 and 14463 (issued 3/29/05). As for the Georgia Commission, it had to be reversed by the federal district court of the Atlanta Division of the Northern District of Georgia. See Justice Cooper's Order in No. 1:05-CV-0674-CC (issued 4/5/05).

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 24, 2005

PETITION OF

A.R.C. NETWORKS INC. d/b/a
INFOHIGHWAY COMMUNICATIONS, INC.,
and XO COMMUNICATIONS, INC.

For a Declaratory Ruling Directing Verizon
to Continue to Provision Certain UNEs and
UNE Combinations

CASE NO. PUC-2005-00042

ORDER DISMISSING AND DENYING

On March 14, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, and XO Communications, Inc. (collectively, "Petitioners"), filed with the State Corporation Commission ("Commission") their "Petition for Emergency Declaratory Relief" ("Petition") seeking an action from this Commission to prevent Verizon Virginia Inc. ("Verizon") "from breaching its interconnection agreements . . . by prematurely ending the offering of certain unbundled network elements ("UNEs") and UNE combinations."

On March 15, 2005, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") filed a motion supporting the Petition and requesting permission to participate in the proceeding.

By this Order, the Commission dismisses the Petition and denies Covad's motion. Petitioners seek a declaratory ruling but do not cite any Commission rule under which the Petition ostensibly is filed or upon which the Commission may grant the requested relief, thus warranting dismissal of the Petition. Furthermore, although not cited by the Petitioners, we note that Covad's motion references 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure ("Rules"), which, at Subpart C, states that "Persons having no other adequate remedy

may petition the commission for a declaratory judgment." That rule also states that any such "petition shall meet the requirements of 5 VAC 5-20-100 B," and the requirements of 5 VAC 5-20-100 B state that the petition shall contain "a certificate showing service upon the defendant." The Petition, however, does not include a certificate showing service upon the defendant. Thus, even if we conclude that the Petitioners implicitly filed for a declaratory ruling under 5 VAC 5-20-100 C, the Petition did not comply with the Rules and accordingly is dismissed.

We find that this matter also should be dismissed if the Petition was properly filed in accordance with 5 VAC 5-20-100 C of the Commission's Rules. Specifically, the Petitioners do not establish that they have "no other adequate remedy," as required by 5 VAC 5-20-100 C. In addition, the Petitioners do not identify the specific contractual provisions that Verizon allegedly intends to breach, and, to the extent that this is a purely contractual dispute, it "may be more appropriately addressed by courts of general jurisdiction."[1] Furthermore, Petitioners assert that Verizon's obligations to continue the provision of certain services arise from the so-called Triennial Review Remand Order recently issued by the Federal Communications Commission ("FCC") in *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005). Thus, insofar as the matters raised by the Petition require construction of this FCC ruling, the parties may have an adequate – and more appropriate – remedy by seeking relief from that agency.

Finally, our dismissal of the Petition renders Covad's motion moot and, thus, it is hereby denied.

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[1] *See Petition of Cavalier Telephone, LLC v. Verizon Virginia Inc., For enforcement of interconnection agreement*, Case No. PUC-2002-00089, Final Order at 2 (Jan. 31, 2003).

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The Petition filed by A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation and XO Communications, Inc., is DISMISSED.

(2) The motion filed by DIECA Communications, Inc., d/b/a Covad Communications Company is DENIED.

(3) This matter is dismissed and the papers herein shall be transferred to the file for ended causes.

AN ATTESTED COPY HEREOF shall be sent by the Clerk of the Commission to: Andrea Pruitt Edmonds, Esquire, Kelley Drye & Warren LLP, 8000 Towers Crescent Drive, Suite 1200, Vienna, Virginia 22182; Eric M. Page, Esquire, LeClair Ryan, P.C., 4201 Dominion Boulevard, Suite 200, Glen Allen, Virginia 23060; Lydia R. Pulley, Esquire, Vice President, Secretary, and General Counsel, Verizon Virginia Inc., 600 East Main Street, Suite 1100, Richmond, Virginia 23219-2441; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.

[Service Date July 8, 2005]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of	)	DOCKET NO. UT-043013
VERIZON NORTHWEST INC.	)	ORDER NO. 17
With	)	
COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON	)	ARBITRATOR'S REPORT AND DECISION
Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order	)	
.....	)	

1 ***Synopsis.*** *The Arbitrator recommends resolution of 32 issues and numerous subissues that the parties to this arbitration presented for decision. The Arbitrator recommends significant changes to Verizon's proposed amendments, including consolidation of the two amendments into one amendment. Given the significant changes recommended, the Order also recommends the parties request the Commission convene a workshop to assist the parties in reaching agreement on amendment language.*

allow continued access to new UNE-P customers or arrangements until the effective date of the amendment is rejected.

92 In implementing the FCC's decision to bar CLECs from adding new UNE-P customers or arrangements, Verizon suggests that the Commission limit the meaning of "embedded customer base" to those end-user customers with UNE-P service who do not request any change in their service prior to March 11, 2006. Verizon requests that the Commission wait to resolve the issue until the FCC resolves a pending Petition for Reconsideration on the issue. The CLECs, on the other hand, request that the Commission find that CLECs may add a new UNE-P line to an existing UNE-P customer's service, move a UNE-P line from one location to another if the customer moves, or modify the UNE-P service upon the end-user customer's request, without violating the FCC's "no new adds" decision. The FCC did not limit its prohibition on new UNE-P provisioning just to new customers, but also limited access to "new UNE-P arrangements."[111] It is reasonable to infer from this language that CLECs may not obtain new UNE-P lines for an existing customer. Similarly, Verizon need not provide CLECs access to a new UNE-P line when an existing customer moves and seeks the same service at a new location. This situation is not substantially different from an end-user customer discontinuing service. These issues are resolved in favor of Verizon.

93 On the other hand, it is reasonable to infer from the Triennial Review Remand Order that Verizon must continue to provide CLECs access to UNE-P service for their existing customers, including performing any repairs or maintenance on the line, or adding or changing any features at the end-user's request, until the CLEC requests an alternate arrangement. The FCC specifically provided that "[d]uring the twelve-month transition period, ... competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches

[111] *Triennial Review Remand Order*, ¶ 227.

or to alternative access arrangements negotiated by the carriers."[112] This issue is resolved in favor of the CLECs.

94 Finally, Verizon objects to a portion of AT&T's proposed Section 3.1 placing a condition on Verizon assessing transition rates unless Verizon has complied with requirements for allowing CLECs to commingle UNEs or UNE Combinations. Verizon is correct that the FCC did not place such conditions on the implementation of transition plans or rates. To do so would be contrary to the FCC's regulations and federal law. The last sentence of AT&T's proposed Section 3.1 is rejected.

4. ISSUE NO. 4: What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?

95 Similar to Issue No. 3 above, this issue addresses how the amendment should implement changes in unbundled access to DS1 loops, DS3 loops, and dark fiber identified in the Triennial Review Remand Order. The primary disagreements between the parties concern whether and how the FCC's transition plan for converting to alternative arrangements should be included in the amendment, the effective date of the new unbundling rules, and how to interpret the FCC's bar on adding new high-capacity loop UNEs. The sections of the parties' proposed amendments relevant to Issue No. 4 are as follows:

Verizon September 10, 2004, Amendment 1: §§ 3.1, 3.2, 4.7.3
AT&T March 14, 2005, Amendment: §§ 2.6, 2.8, 2.12, 2.13, 2.37, 3.2, 3.11
MCI April 4, 2005, Amendment: §§ 9, 12.7.15

[112] *Id.*, ¶ 199; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("[A]n incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier *to serve its embedded base of end-user customers.*" (Emphasis added)).

96 In the Triennial Review Remand Order, the FCC eliminated unbundling obligations for dark fiber loops and determined impairment for unbundled access to high-capacity DS1 and DS3 loops on a wire center basis, using as criteria the number of business lines and fiber-based collocators in wire centers.[113] The FCC also limited the number of high capacity loops a CLEC may obtain to a single building.[114] A CLEC must "undertake a reasonably diligent inquiry" into whether high capacity loops meet these criteria, and then must self certify to the ILEC that the CLEC is entitled to unbundled access.[115] The ILEC must provision the UNE and may then bring a dispute before a state commission or other authority if it contests the CLEC's access to the UNE, following the dispute resolution process in interconnection agreements.[116]

97 The FCC adopted a transition plan of 18 months for migration away from access to dark fiber loops and 12 months for migration away from access to DS1 and DS3 loops at wire centers meeting the non-impairment criteria, providing rates of 115 percent of the existing rate for the transition periods.[117] The FCC also established a "no new adds" requirement for dark fiber loops and high capacity loops meeting the criteria for non-impairment, determining that CLECs may not add new high capacity UNEs where the FCC has found no impairment.[118]

98 Similar to its position on implementing the FCC's transition plan for mass market switching, Verizon asserts that its proposals adequately address the changes in its unbundling obligations and that there is no need to incorporate

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[113] *Triennial Review Remand Order*, ¶¶ 146, 155, 166, 174, 178, 182, 195.
[114] *Id.*, ¶¶ 177, 181.
[115] *Id.*, ¶ 234.
[116] *Id.*
[117] *Id.*, ¶¶ 195-98. The FCC provides that "[h]igh-capacity loops no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *Id.*, n.524. The issue of pricing of these transition UNEs is addressed below in Issues No. 6 and 11.
[118] *Id.*, ¶ 195.

specific language concerning transition in the parties' agreements.[119] Verizon asserts that the effective date of the FCC's decision precluding CLECs from adding new high capacity loop UNEs is March 11, 2005, not the effective date of the amendment.[120] Verizon objects to including in the agreement a list of wire centers that satisfy the non-impairment criteria for DS1 and DS3 loops, asserting that none of its wire centers in Washington meet the FCC's non-impairment criteria.[121] Likewise, Verizon opposes establishing a process for considering changes in wire center eligibility, asserting that the FCC has established a clear process for such changes.[122]

99 AT&T proposes language in Sections 3.2.1 and 3.2.5 of its March 14, 2005, proposed amendment specifically identifying the FCC's decisions and transition plans for DS1, DS3, and dark fiber loops. Based on information Verizon recently filed with the FCC, AT&T asserts that Verizon is obligated to provide unbundled access to DS1 and DS3 loops in all of its wire centers in Washington state.[123] AT&T asserts that CLECs should continue to have access to DS1 and DS3 loops at these wire centers "for the life of the agreement," and asserts that the amendment should provide for a transition period if, in the future, a wire center satisfies the non-impairment criteria.[124]

100 AT&T also requests that the amendment require Verizon to provide verifiable information to the Commission concerning the number of business lines and collocators in wire centers in Washington.[125] AT&T asserts that this information will allow AT&T and other CLECs access to the necessary information for

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[119] Verizon Initial Brief, ¶ 58; Verizon Reply Brief, ¶ 40.
[120] Verizon Initial Brief, ¶ 57; Verizon Reply Brief, ¶ 41.
[121] Verizon Reply Brief, ¶ 42.
[122] *Id.*, ¶¶ 42-45.
[123] AT&T Initial Brief, ¶ 36.
[124] *Id.*, ¶ 39.
[125] *Id.*, ¶ 38; *see also* AT&T March 14, 2005, Amendment, § 3.9.

certifying whether unbundled access to high capacity loops is permitted at the wire center.[126]

101 MCI proposes language to implement the FCC's decisions and transition plans for high capacity loops in Section 9 of its April 4, 2005, Amendment. Unlike AT&T's proposal, MCI's language would allow CLECs access to new unbundled DS1, DS3, and dark fiber loops until the effective date of the amendment.[127] Similar to AT&T, MCI proposes language addressing specific wire centers in Washington State and whether the wire centers meet the FCC's criteria for non-impairment.[128] MCI's proposal includes quarterly filings by Verizon with an opportunity for response, and a dispute resolution process, should disputes arise over Verizon's designation of wire centers.[129]

102 The Competitive Carrier Group requests that the amendment include language identifying the FCC's transition plans and impairment criteria for high capacity loops.[130] The Competitive Carrier Group requests that the amendment include definitions of "business lines" and "fiber-based collocators" consistent with the definitions in the Triennial Review Remand Order.[131] Similar to AT&T and MCI, the Competitive Carrier Group asserts that the amendment must include a list of wire centers that satisfy the non-impairment criteria for DS1 and DS3 loops.[132]

103 The Competitive Carrier Group requests that the amendment include a process for reviewing and verifying Verizon's initial and future identification of wire

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[126] AT&T Initial Brief, ¶ 38.
[127] MCI April 4, 2005, Amendment, §§ 9.1.2.1, 9.2.2.1, 9.4.1; *see also* MCI Initial Brief at 5.
[128] MCI April 4, 2005, Amendment, § 9.3.
[129] *Id.*
[130] CCG Initial Brief, ¶¶ 14, 17.
[131] *Id.*, ¶ 14. AT&T includes definitions of these terms in its proposed amendment. *See* AT&T March 14, 2005, Amendment, §§ 2.1, 2.18. These definitions will be addressed in Issue No. 9, below.
[132] CCG Initial Brief, ¶ 15.

centers where there is no impairment.[133] The Competitive Carrier Group asserts, like MCI, that the restriction against access to new high capacity loops that meet the non-impairment criteria and dark fiber loops should become effective when the Commission approves the amendment.[134] Finally, the Joint CLECs and Competitive Carrier Group suggest that the Commission not arbitrate the issue until the parties have an opportunity to negotiate appropriate language to implement the provisions of the Triennial Review Remand Order.[135]

104 ***Discussion and Decision.*** Consistent with the decision above concerning Issue No. 3, the FCC's transition plans for high capacity and dark fiber loops should be included in the amendment, as suggested by the CLECs. Similarly, for the reasons identified above, the effective date for the FCC's decision not to permit CLECs to add new high capacity loops that meet the non-impairment criteria is March 11, 2005, not the effective date of the amendment.

105 The FCC establishes a self-certification process for CLECs to obtain access to high capacity loops, and provides that ILECs must follow the dispute resolution process identified in the parties' interconnection agreements to resolve disputes over access to high capacity loop UNEs.[136] Despite the CLECs' request, there does not appear to be a need, at this point, to include a list of eligible wire centers in the amendment, as Verizon and the CLECs agree that no Verizon wire center meets the non-impairment criteria for high-capacity loops. In the future, however, the eligibility of DS1 and DS3 loops at these wire centers may change. CLEC access to accurate and verifiable information that forms the basis of self-certification would ensure more accurate self-certifications and fewer disputes.

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[133] *Id.*

[134] *Id.*, ¶ 17.

[135] Joint Response Brief, ¶ 18.

[136] *Triennial Review Remand Order*, ¶ 234.

106 It makes sense, therefore, to develop and maintain an accurate and up-to-date list of Verizon's wire centers and CLEC eligibility for access to high capacity loop UNEs at these wire centers. This list, however, need not be attached to the amendment, but can be maintained by the Commission in an easily accessible format posted to the Commission's website. Commission staff has initiated an investigation docket, Docket No. UT-053025, for the purpose of analyzing the status of the impact of the Triennial Review Remand Order on the competitive environment in Washington State. This docket would be appropriate for developing wire center lists as well as a process for updating the lists for both Verizon and Qwest. Thus, the CLECs' proposals to include a wire center list and process for updating the list in the amendment are rejected. The parties are encouraged to file comments in and participate in any workshops or proceedings in Docket No. UT-053025.

107 In addition, AT&T's proposal to make the wire center list permanent for the life of the interconnection agreement is rejected. AT&T's proposal is not consistent with the FCC's finding that carriers should include in their interconnection agreements transition mechanisms for facilities that meet the non-impairment criteria in the future.[137]

108 None of the parties' proposals adequately address the appropriate transition period for migrating to alternative arrangements should a DS1 or DS3 loop meet the nonimpairment criteria in the future. Verizon's and MCI's proposals include a 90-day notice period before discontinuing or rejecting new orders for a facility or element that becomes a "Discontinued Facility," but do not address transition for existing facilities to alternative arrangements. AT&T requests a twelve-month transition period. The FCC set a twelve-month transition period to allow CLECs and ILECs time to deploy, purchase, or lease facilities to make an orderly transition. Because the basis for the FCC's choice of a twelve-month transition period is the same for future changes to UNE eligibility, a twelve-month

[137] *Id.*, ¶ 142 n.399.

transition period is appropriate in the interim until the Commission establishes a different transition period in Docket No. UT-053025. The notice and transition period should be triggered by Commission determination that a wire center's eligibility has changed, after the ILEC files an updated list of eligible wire centers and the Commission reviews that filing.

109 Finally, the FCC suggests that parties follow the dispute resolution process in their agreements for disputes concerning eligibility of high capacity loops in a given wire center. Alternatively, given the need for swift and efficient resolution of disputes concerning CLEC self-certifications for obtaining high capacity loop UNEs, the parties should develop a specific dispute resolution process in the amendment for that purpose.

5. ISSUE NO. 5: What obligations, if any with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?

110 Similar to Issues No. 3 and 4 above, this issue addresses how the amendment should implement changes in unbundled access to dedicated interoffice transport identified in the Triennial Review Remand Order. As above, the primary disagreements between the parties concern whether and how the FCC's transition plan for converting to alternative arrangements should be included in the amendment, the effective date of the new unbundling rules, and how to interpret the FCC's bar on adding new transport UNEs. The sections of the parties' proposed amendments relevant to Issue No. 5 are as follows:

Verizon September 10, 2004, Amendment 1: §§ 3.1, 3.2, 4.7.3
AT&T March 14, 2005, Amendment: §§ 2.7, 2.8, 2.9, 2.10, 2.11, 2.37, 3.6, 3.11
MCI April 4, 2005, Amendment: §§ 10, 12.7.4, 12.7.17

111 In the Triennial Review Remand Order, the FCC determined impairment for unbundled access to DS1, DS3, and dark fiber transport on the basis of routes between Tier 1, 2, or 3 wire centers, using as tier criteria the number of business lines and fiber-based collocators in the wire centers.[138] The FCC also limited the number of high capacity transport circuits a CLEC may obtain on routes for which unbundling obligations remain.[139] Similar to high capacity loops, a CLEC must "undertake a reasonably diligent inquiry" into whether transport circuits meet these criteria, and then must self-certify to the ILEC that the CLEC is entitled to unbundled access.[140] The ILEC must provision the UNE, and then, following the dispute resolution process in interconnection agreements, may bring a dispute before a state commission or other authority if it contests the CLEC's access to the UNE.[141]

112 The FCC adopted a transition plan of 18 months for migration away from access to dark fiber transport circuits meeting the non-impairment criteria and 12 months for migration away from access to DS1 and DS3 transport circuits meeting the non-impairment criteria, providing for rates of 115 percent of the existing rate for the transition periods.[142] The FCC also established a "no new adds" requirement for DS1, DS3, and dark fiber transport circuits meeting the criteria for non-impairment, determining that CLECs may not add new transport UNEs where the FCC has found no impairment.[143]

113 Verizon takes the same positions concerning amendment language for dedicated interoffice transport as it does for mass market switching and high capacity

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[138] *Id.*, ¶¶ 66, 79-80, 111, 112, 118, 123, 126, 129.
[139] *Id.*, ¶¶ 128, 131.
[140] *Id.*, ¶ 234.
[141] *Id.*
[142] *Id.*, ¶¶ 142-44. The FCC provides that "[d]edicated transport facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *Id.*, n.408. The issue of pricing of transition UNEs is addressed below in Issues No. 6 and 11.
[143] *Id.*, ¶¶ 142, 145.

transport.[144] Verizon opposes the CLECs' requests for a list of wire centers that satisfy the non-impairment criteria for DS1 and DS3 transport. Verizon asserts that it has identified only two wire centers in Washington that meet the criteria and provides on its website a public list of all wire centers that meet the criteria.[145] Consistent with its position concerning high capacity loops, Verizon insists that it will provide CLECs with the necessary information to verify Verizon's designation of wire centers and routes, and that there is no need to address this hypothetical situation in the amendment.[146]

114 AT&T and MCI propose language for the amendment specifically identifying the FCC's decisions and transition plans for DS1, DS3, and dark fiber transport.[147] The Competitive Carrier Group requests that the amendment include specific language addressing the transition.[148] AT&T, MCI, and the Competitive Carrier Group take positions similar to those expressed for high capacity loops on the issues of inclusion of transition plans and a wire center list in the amendment, the effective date of the FCC's "no new adds" decision, and a process for changes to the wire center list.

115 ***Discussion and Decision.*** Issue No. 5 is resolved consistent with Issues No. 3 and 4, above:

- The FCC's transition plans for DS1, DS3, and dark fiber transport should be included in the amendment, as suggested by the CLECs.
- The effective date of the FCC's decision to preclude CLECs from adding new DS1, DS3, and dark fiber transport circuits that meet the non-

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[144] Verizon Initial Brief, ¶¶ 59-62; Verizon Reply Brief, ¶¶ 46-47.
[145] Verizon Reply Brief, ¶ 48.
[146] *Id.*, ¶¶ 49-50.
[147] *See* AT&T March 14, 2005, Amendment, §§ 3.6, 3.9; *see also* MCI April 4, 2005, Amendment, § 10.
[148] CCG Initial Brief, ¶¶ 18-22.

impairment criteria is March 11, 2005, not the effective date of the amendment.

- AT&T's proposal to make the wire center list permanent for the life of the interconnection agreement is rejected.
- Twelve months is an appropriate transition period for future discontinued transport facilities, until the Commission establishes a different transition period.
- The notice and transition period should be triggered by a Commission determination that a wire center's eligibility has changed.
- The parties should develop a specific dispute resolution process concerning CLEC self-certification for obtaining transport UNEs.

116 The issue of a central, verifiable wire center listing requires further discussion. Verizon discounts AT&T's arguments about verifying Verizon's designations of wire centers, claiming that it is sufficient for Verizon to post a list of ineligible wire centers on its website and make verifying information available to CLECs on request.[149] AT&T asserts that it is important to correctly designate a wire center as ineligible, as once it is so designated, it will remain ineligible permanently.[150] AT&T requests the Commission conduct a generic inquiry into wire centers designated by Verizon as ineligible, resulting in the Commission certifying a list of wire center designations that would be incorporated in all interconnection agreements.[151] AT&T asserts that the Commission could resolve any disputes concerning the designation of wire centers.[152]

117 For the same reasons discussed above, this issue is resolved in favor of the CLECs, in part. As discussed above, AT&T's request to append a permanent list of eligible or ineligible wire centers to the amendment is rejected. It is crucial to

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[149] Verizon Reply Brief, ¶¶ 48-50.
[150] AT&T Initial Brief, ¶¶ 49-50.
[151] *Id.*, ¶ 50.
[152] *Id.*

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Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court,N.D. Georgia, Atlanta Division.

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al., Defendants.

No. 1:05-CV-0674-CC.

April 5, 2005.

Matthew Henry Patton, Michael E. Brooks, Kilpatrick Stockton, Atlanta, GA, Sean A. Lev, Kellogg Huber Hansen Todd Evans & Figel, Washington, DC, for Plaintiff.

Daniel S. Walsh, Office of State Attorney General, Atlanta, GA, Marc A. Goldman, Jenner & Block, Washington, DC, Dara L. Steele-Belkin, Teresa Wynn Roseborough, Sutherland Asbill & Brennan, Anne Ware Lewis, Frank B. Strickland, Strickland Brockington Lewis, Barry J. Armstrong, McKenna Long & Aldridge, Suzanne W. Ockleberry, AT&TCommunications of the Southern States, Inc., Christiane (Tiane) L. Sommer, Governor's Office of Consumer Affairs Consumers' Utility Counsel Division, Atlanta, GA, Newton M. Galloway, Smith Galloway Lyndall & Fuchs, Terri Mick Lyndall, Galloway & Lyndall, LLP, Griffin, GA, for Defendants.

ORDER

COOPER, J.

***1** Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See, e.g., Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir.2003); *American Red Cross v. Plam Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ("UNE") as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission ("FCC") has found that unbundling of loops and transport is not required). Consistent with the FCC's ruling in the *Order on Remand* [FN1] at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

FN1. Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005).

First, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue. [FN2] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

FN2. In evaluating the merits of BellSouth's legal argument, this Court owes no deference to the PSC's understanding of federal law. *See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F.Supp.2d 1286, 1291 (N.D.Fla.2000), *aff'd*, 298 F.3d 1269 (11th Cir.2002).

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The

FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("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."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id.* ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id.* ¶ ¶ 142, 195.

***2** The FCC also created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id.* ¶ ¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were "not permit[ed]" to place new orders. *Id.* ¶ ¶ 142, 195, 199. The 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.

In arguing for a different result, the PSC and the other defendants primarily rely on paragraph 233 of the *Order on Remand,* which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities. That provision, however, states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *Order on Remand* ¶ 233. In conflict with that language, the PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order* [FN3] at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive ... that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

FN3. Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* Case No. 05-C-0203 (N.Y.P.S.C. Mar.16, 2005) (*"New York Order"*).

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action 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. *See United Gas Improvement Co. v. Callery Props., Inc.,* 382 U.S. 223, 229, 86 S.Ct. 360, 15 L.Ed.2d 284 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC,* 359 F.3d 554, 595 (D.C.Cir.2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNEPlatform orders must be pursued on direct review of the FCC's order, not before this Court.

***3** In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the

PSC's authority to resolve it.

Second, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a direct result of the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week. Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e.g., Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir.1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

Third, the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform "hinder[s] the development of genuine, facilities-based competition," contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury. *See, e.g., Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir.1985) (holding that private interest in avoiding arbitration could not count as evidence of "irreparable harm," because such a holding "would fly in the face of the strong federal policy in favor of arbitrating disputes"). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order* [FN4] that soon they might well not be able to place new orders for these UNEs.

> FN4. 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, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

***4** *Fourth,* the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, 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," *Order on Remand* ¶ 2, that its new rules would "best allow[ ] for innovation and sustainable competition," *id.,* and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id.* ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED.

N.D.Ga.,2005.
BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC
Slip Copy, 2005 WL 807062 (N.D.Ga.)

Briefs and Other Related Documents (Back to top)

• 1:05cv00674 (Docket) (Mar. 11, 2005)

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368 F.Supp.2d 557
Briefs and Other Related Documents

United States District Court,S.D. **Mississippi**,Jackson Division.
BELLSOUTH TELECOMMUNICATIONS, INC. Plaintiff
v.
MISSISSIPPI PUBLIC SERVICE COMMISSION, Dorlos "BO" Robinson, in His Official Capacity as the Chairman of the PSC, Nielson Cochran, in His Official Capacity as the Vice Chairman of the PSC, and Michael Callahan, in His Official Capacity as Commissioner of the PSC Defendants
Nuvox Communications, Inc., KMC Telecom III, LLC, and KMC Telecom V, Inc., Xspedius Communications LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xpedius Management Co. of Jackson, and Communigroup of Jackson, Inc. D/B/A Communigroup and **McImetro** Access Transmission Services LLC Defendant-Intervenors
No. CIV.A. 3:05CV173LN.

April 13, 2005.

Background: Incumbent local exchange carrier (ILEC) brought action challenging state public service commission's order allowing competitive local exchange carriers (CLEC) to place new unbundled network element-platform (UNE-P) switching orders. ILEC moved for preliminary injunction.

Holdings: The District Court , Tom S. Lee, J., held that:

(1) Federal Communications Commission's (FCC) ruling that ILECs were no longer required to provide CLECs with access to unbundled switching was not subject to negotiation process dictated by parties' interconnection agreements, and

(2) ILEC was likely to prevail on merits of its claim.

Motion granted.

West Headnotes

[1] **Injunction 212 138.1**
212k138.1 Most Cited Cases
To prevail on request for preliminary injunctive relief, burden is on plaintiff to show: (1) substantial likelihood that plaintiff will prevail on merits, (2) substantial threat that irreparable injury will result if injunction is not granted, (3) that threatened injury outweighs threatened harm to defendant, and (4) that granting preliminary injunction will not disserve public interest.

[2] **Telecommunications 372 860**
372k860 Most Cited Cases
(Formerly 372k267)
Federal Communications Commission's (FCC) ruling that incumbent local exchange carriers (ILEC) would no longer be required to provide competitive local exchange carriers (CLEC) with access to unbundled switching was not subject to negotiation process dictated by parties' interconnection agreements, but rather was immediately effective on date established in order, even though ruling required parties to negotiate in good faith regarding any rates, terms, and conditions necessary to implement rule changes; ILECs entered into interconnection agreements only because they were forced to do so by prior FCC order, and ruling expressly directed that no new unbundled network element-platform (UNE-P) customers be added. Communications Act of 1934, § 271, as amended, 47 U.S.C.A. § 271.

[3] **Telecommunications 372 856**
372k856 Most Cited Cases
(Formerly 372k267)
To extent state public service commission's judgment concerning interpretation of approved interconnection agreement between incumbent local exchange carriers (ILEC) and competitive local exchange carriers (CLEC) conflicts with Federal Communications Commission's (FCC) interpretation of FCC regulations, FCC's interpretation controls under Supremacy Clause. U.S.C.A. Const. Art. 6, § 2.

[4] **Telecommunications 372 903**
372k903 Most Cited Cases
(Formerly 372k267)
Incumbent local exchange carrier (ILEC) was likely to prevail on merits of its claim that it had no

obligation to allow competitive local exchange carriers (CLEC) to place new unbundled network element-platform (UNE-P) switching orders, and thus ILEC was entitled to preliminary injunction barring state public service commission from requiring it to accept such orders, where Federal Communications Commission (FCC) ruled that it was no longer required to provide competitive local exchange carriers (CLEC) with access to unbundled switching, ILEC was losing substantial number of customers to CLECs, and CLECs had alternative means of competing with ILEC.

***558** John C. Henegan , Butler, Snow, O'Mara, Stevens & Cannada , Jackson, Sean A. Lev-PHV , Kellogg, Huger, Hansen, Todd, Evans & Figiel , PLLC, Washington, DC, Thomas B. Alexander , BellSouth Telecommunications, Inc., Jackson, for Plaintiff.
George M. Fleming , **Mississippi** Public Service Commission , Steven J. Allen , Brunini, Grantham, Grower & Hewes , Kathryn H. Hester , Watkins Ludlam Winter & Stennis, P.A. , Robert P. Wise , Wise, Carter, Child & Caraway , Jackson, James U. Troup-PHV , McGuirewoods, LLP-Washington, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.
This cause is before the court on the motion of plaintiff BellSouth Telecommunications***559** (BellSouth) for preliminary injunction asking that the court enjoin the March 9, 2005 order entered by the **Mississippi** Public Service Commission to the extent that such order allows competitors to place new UNE-Platform orders. Defendant **Mississippi** Public Service Commission (PSC) and the various intervenors filed responses in opposition to the motion. Based on its review of the parties' submissions and their arguments to the court at the April 8th hearing on the motion, the court concludes that BellSouth's motion should be granted.

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Order on Remand (TRRO) in CC Docket No. 01-338 following remand in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C.Cir.2004). FN1 In the TRRO, among other things, the FCC established new unbundling rules regarding mass market local circuit switching, high-capacity loops and dedicated interoffice transport. All that is relevant to the present motion is its ruling as to mass market switching. FN2 Prior to the TRRO, the FCC, pursuant to its authority under the Telecommunications Act of 1996, had consistently held that incumbent local exchange carriers (incumbent LECS), such as BellSouth, were required to provide access to the individual parts of their network systems-switches, loops and transport-on an unbundled basis and at prescribed prices, in order that the competitive LECS would be in a position to effectively compete in the marketplace. These individual parts of the system are known as "unbundled network elements" or UNEs, and as BellSouth explains, access to unbundled switching is important because it makes it possible for competitive LECs to obtain the UNE Platform (or UNE-P), which consists of all the individual or piece-parts of the BellSouth network combined.

FN1. *See* Order on Remand, *IN RE UNBUNDLED ACCESS TO NETWORK ELEMENTS*, WC Docket No. 04-313, CC Docket, No. 01-338, 2005 WL 289015 (F.C.C. Feb. 4, 2005).

FN2. BellSouth's complaint in this cause also seeks relief based on provisions of the TRRO concerning the unbundling of loops and transport, but the present motion concerns only the FCC's ruling pertaining to access to switching.

In its TRRO, the FCC ruled that the ability of competitive LECs to compete would not be impaired without access to unbundled switching, and concluded, therefore, that incumbent LECs would no longer be required to provide competitive LECs with access to unbundled switching. It specifically recognized that immediate implementation of its new rules posed a potential for disruption in service, and therefore established a twelve-month transition period, with accompanying transition pricing, for migration of competitive LECs' "embedded customer base" from UNE-P to alternate arrangements for service. The FCC determined that this twelve-month transition period would provide "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition," and hence gave carriers twelve months from the date of the TRRO to "modify their interconnection agreements, including completing any change of law processes," to implement the changes directed by the TRRO. FN3 The FCC stated in ***560** the TRRO, however, that the transition period it adopted applied

"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)...."

> FN3. As dictated by the Telecommunications Act of 1996, 47 U.S.C. § § 251 and 252, incumbent LECs and competitive LECs operate pursuant to "interconnection agreements" which must conform the legal requirements established by the FCC and which are approved, interpreted and enforced by state public utilities commissions. These interconnection agreements typically specify a change of law process by which the parties are required to engage in notice, negotiation and, if necessary, dispute resolution, to account for changes in the law that apparently occur with relative frequency in this area.

Accordingly, on February 11, 2005, BellSouth sent out a "Carrier Notification" to all of its competitive LECs advising that as of March 11, 2005, the effective date of the TRRO, BellSouth would no longer accept orders for switching as a UNE item. A number of the competitive LECs responded by filing a Joint Petition for Emergency Relief with the PSC, asking that BellSouth be directed to continue to provide unbundled switching in accordance with its undertaking in its interconnection agreements until such time as the parties had completed the change of law process. In response, the PSC entered the order that is the subject of BellSouth's present motion, ruling that the parties were required to adhere to the change of law process in their interconnection agreements and that until such time as the process, including arbitration, was completed, BellSouth would be required to continue accepting and provision competitive LECs' orders as provided for in their interconnection agreements.

BellSouth brought this action seeking declaratory relief and a preliminary injunction pending the court's expedited review of the PSC's order. BellSouth takes the position that the PSC's order is contrary to, and preempted by the FCC's TRRO, and it thus seeks an order enjoining all defendants from seeking to enforce the PSC's order. FN4

> FN4. Reacting to BellSouth's motion, several of the competitive LECs moved to intervene and orders have been entered granting these motions. One purpose for which one of the intervenors, CommuniGroup of Jackson d/b/a Communigroup, sought to intervene was to file a motion to compel arbitration contending that this dispute is subject to arbitration under its interconnection agreement with BellSouth. Although there has been a significant amount of briefing on this arbitration issue by the parties, the court finds it unnecessary to dwell on this motion for it is manifest that CommuniGroup's position with respect to arbitration is misplaced. BellSouth claims, quite simply, that the PSC's order requiring it to continue to process new orders for UNE-P switching violates federal law and should be enjoined. There is no sense in which this dispute falls within the "arbitration" provision of any interconnection agreement. Accordingly, the motion to compel arbitration will be denied.

[1] To prevail on its request for injunctive relief, the burden is on BellSouth to show "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." ***Mississippi** Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985) (citing *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir.1974)).

The question of BellSouth's likelihood of success on the merits raises two issues: First, while the FCC's February 4, 2005 Order on Remand unequivocally provides for a "nationwide bar on [unbundled switching]," did the FCC intend that this aspect of its Order would be self-effectuating, and if so, was it within the FCC's jurisdiction to make the bar self-effectuating.

[2] As to the first issue, a comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching orders would be immediately effective on the date ***561** established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period

applies only to the embedded customer base, and "does not permit competitive LECs to add new customers using unbundled access to local circuit switching." FN5 At ¶ 227, the Order recites,

> FN5. *See* TRRO ¶ 199; *see also* ¶ 5 ("This transition plan applies only to the embedded customer base, *and does not permit competitive LECs to add new switching UNEs.*") (emphasis added); ¶ 127 (quoted in text).

We require competitive LECs to submit the necessary orders to convert their mass market customers to alternative service arrangement within twelve months of the effective date of this Order. *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 switching pursuant to section 251(c)(3) except as otherwise specified in this order....* We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. (Emphasis added).Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts, by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties' interconnection agreements. FN6

> FN6. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, No. 1:05CV0674CC, 2005 WL 807062 (N.D.Ga. April 5, 2005) (granting BellSouth's emergency motion for preliminary injunction against order of **Georgia** PSC to the extent the order required BellSouth to continue to process new orders for switching as an unbundled network element); Ind. Util. Reg. Comm'n, *Order on Complaint of Indiana Bell Tele. Co., Inc. d/b/a SBC Ind. For Expedited Review of a Dispute with Certain CLECs Regarding Adoptino of an Amendment to Commission Approved Interconnection Agreements*, Cause No. 4278, at 7, (March 9, 2005) ("We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005," irrespective of change of law processes provided by parties' interconnection agreements); Pub. Utilities Comm'n of Ohio, *Order on Emergency Petition for Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving Status Quo With Respect to Unbundled Network Element Orders*, Case No. 05-298-TP-UNC (March 9, 2005) (concluding that while SBC Ohio was required to negotiate and executed interconnection agreements as to embedded customer base, "[t]he FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching ... would no longer apply to serve new customers"); New York Pub. Serv Comm'n, *Order Implementing TRRO Changes*, Case No. 05-C-0203 (March 16, 2005) ("Based on our careful review of the TRRO, we conclude that the FCC does not intend that new UNE-P customers can be added during the transition period...."); Pub. Util. Comm'n of Ca., *Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders*, Application 04-03-014 (March 10, 2005) (concluding that pursuant to the TRRO, "Verizon has no obligatin to process CLEC orders for UNE-P to serve new customers"); Pub. Util. Comm'n of Tex., *Proposed Order on Clarification*, Dkt. No. 28821 (March 8, 2005) ; New Jersey Bureau Pub. Util., Open Hearing, *Implementation of the FCC's Triennial Review Order*, Dkt. No. TO03090705 (March 11, 2005) (refusing to require Verizon to continue providing unbundled access to New discontinued UNE orders as of March 11th); Rhode Island Pub. Util. Comm;n, Open Meeting, *Adopting Verizon's Proposed RI Tariff Filing*, Dkt. 3662 (March 8, 2005) (adopting tariff filing of Verizon

which provide that Verizon would no longer accept orders for the subject elements (i.e., switching) as of March 11, 2005); State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order*, Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (agreeing with incumbent LEC regarding the self-effectuating nature of the TRRO as to serving new customers, and observing that "[i]t does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist"); Mass. Dept. Of Telecommunications and Energy, *Open Meeting on Complaint Against Verizon for Emergency Declaratory Relief Related to the Continued Provision of Unbundled Network Elements After the Effective Date of the Order on Remand*, Dkt. No. 334-05 (March 22, 2005) (denying request for order requiring Verizon to continue to accept and process orders for unbundled network elements pursuant to their interconnection agreements and to require Verizon to comply with change of law provision); Mich. Pub. Serv. Comm'n, *Order on Application of the Competitive 12 Local Exchange Carriers*, Case No. U-14303, at 9 (March 29, 2005) (concluding that competitors "no longer have a right under Section 251(c)(3) to order [the UNE Platform] and other UNEs that have been removed from the [FCC's] list"); Me. Pub. Util. Comm'n, *Order on Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Servs.*, Dkt. No.2002-682, at 4 (March 7, 2005) ("We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective.").

Contrary holdings have been issued only by the **Kentucky** and Louisiana Public Utilities Commissions, and the United States District Court for the Northern District of Illinois, *Illinois Bell Telephone Co. v. Hurley*, 2005 WL 735968, *6 (N.D.Ill.2005).

***562** Despite this, the PSC and defendant intervenors, relying primarily on § 233 of the TRRO, included in a section entitled "Implementation of Unbundling Determination," argue that the FCC's ruling as to new orders for unbundled switching is not self-effectuating but rather is subject to the negotiation process dictated by the parties' interconnection agreements. Paragraph 233 states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.... Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

In its March 16, 2005 *Order Implementing TRRO Changes*, the New York Public Service Commission considered and rejected an argument that ¶ 233 of the Order requires incumbent LECs to follow change of law provisions in interconnection agreements with respect to implementation of the bar on new orders for UNE-P switching, stating:

> Although TRRO ¶ 233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for ***563** new UNE-P customers would run contrary to the express directive in TRRO § 227 that no new UNE-P customers be added.

The court in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, No. 1:05CV0674CC, 2005 WL 807062 (N.D.Ga. April 5, 2005), found the New York Commission's reasoning persuasive:

> The PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change of law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission 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.." *New York Order* at 13, 26. Any result other than precluding new UNE Platform customers on March 11, would "run contrary to the express directive ... that no [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

The court similarly finds this reasoning persuasive. FN7 Moreover, the notion that BellSouth should be made to negotiate over something which the FCC has determined it has no obligation to offer on an unbundled basis and which BellSouth has no intention of offering simply makes no sense. As was cogently observed by the Rhode Island Public Utilities Commission,

> FN7. It does so, as well, recognizing that there is authority to the contrary. *See Illinois Bell Telephone Co. v. Hurley*, 2005 WL 735968, *6 (N.D.Ill.2005) ("Unlike ¶ 227, ¶ 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of 'Implementation of Unbundling Decisions' and mandates that the parties 'negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement' the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches."),

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, albeit with some delay.*Adopting Verizon's Proposed RI Tariff Filing,* Dkt. 3662 (R.I.PUC March 8, 2005).

The PSC and defendant intervenors next argue that even if the court were to conclude that the TRRO was intended to be self-effectuating, it still may not be given effect inasmuch as the FCC lacks jurisdiction to abrogate the terms and conditions of existing interconnection agreements regarding unbundled switching. In this vein, they argue that the parties' respective rights and obligations vis-a-vis BellSouth's provision of unbundled switching are governed exclusively by the parties' voluntarily negotiated interconnection agreements, over which the FCC has no jurisdiction. They further submit that even if the FCC did have jurisdiction to modify or abrogate the interconnection agreements, the TRRO does not reflect ***564** that the FCC made the requisite findings under the *Mobile Sierra* doctrine.

These arguments raise the question, highlighted by the parties' arguments, of whether the TRRO was intended to directly abrogate or modify the interconnection agreements, or whether, instead, enforcement of the TRRO would indirectly result in the modification of or abrogation of portions of the interconnection agreements. In either case, however, and despite the defendant and defendant-intervenors' protestations to the contrary, the FCC had authority to act in the manner it did. FN8

> FN8. In the numerous rulings by state utilities commissions and courts addressing the FCC's Order, none to date has directly addressed whether the FCC had jurisdiction to impose its immediate bar to new orders for unbundled switching. Perhaps that is because no party has challenged the FCC's jurisdiction in this regard. Indeed, the recent opinion by the **Georgia** District Court specifically noted that "the [**Georgia**] PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements." *BellSouth v. MCIMetro Access*, 2005 WL 807062, at *2.

[3] If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are "not ... ordinary private contract[s]," and are "not to be construed as ... traditional contract[s] but as ... instrument [s] arising within the context of ongoing federal and state regulation." *E.SPIRE Communications, Inc., v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir.2004); *see also Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir.2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). It cannot reasonably be disputed that the provisions in the various interconnection agreements permitting the UNE Platform are there not because this was something the parties freely and voluntarily

negotiated, but rather because this is what BellSouth was required to provide by law, and specifically by the FCC's earlier unbundling decisions. As BellSouth aptly notes, these provisions are vestiges of the now-repudiated FCC regime. *See BellSouth v. MCIMetro Access*, No. 1:05CV0674CC (N.D.Ga. April 5, 2005) ("[I]t would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have been repeatedly vacated by the federal courts as providing overly broad access to UNEs, ... and [i]n any event, any challenge to the FCC's authority to bar new UNE-Platform orders must be pursued on direct review of the FCC's order, not before this Court."); *see also AT&T Communications of Southern States, Inc. v. Bellsouth Telecommunications Inc.*, 229 F.3d 457, 465 (4th Cir.2000) (observing that "many so-called 'negotiated' provisions (in interconnection agreements) represent nothing more than an attempt to comply with the requirements of the 1996 Act."); *see also BellSouth Telecomms.*, 317 F.3d at 1298 (Anderson, J., concurring) (interconnection agreements are "mandated by federal statute" and even voluntary agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards"). Thus, it is substantively inaccurate to characterize the FCC's action as an abrogation of private contracts, and more accurate to characterize it as the elimination of the legal requirements that had dictated the substance of the parties' ***565** regulatory agreements. FN9 And while the 1996 Telecommunications Act vested direct jurisdiction over interconnection agreements with the state utilities commissions, it did not divest the FCC of all authority with respect to such agreements. On the contrary, the Supreme Court has clearly held that the FCC has authority to issue rules and orders implementing all aspects of the 1996 Telecommunications Act. *See Iowa Utilities Board*, 525 U.S. at 380, 119 S.Ct. 721 (the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And thus, "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements... these assignments ... do not logically preclude the Commission's issuance of rules to guide the state-commission judgments," *id.* at 385, 119 S.Ct. 721. To the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation controls under the Supremacy Clause. *MCI Telecommunication Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 516 (3d Cir.2001) (stating that "[i]f the PUC's interpretation conflicts with that of the FCC, the PUC's determination must be struck down"). Here, this court perceives that the FCC has determined as a matter of policy that the Telecommunications Act does not require the provision of unbundled switching and that the bar on new UNE switching orders is to be immediately effective without regard to change of law provisions in specific interconnection agreements. From its conclusion in this regard, in keeping with its plenary authority under the 1996 Act, it follows that the FCC's conclusion prevails over the PSC's contrary conclusion.

> FN9. The *Mobile-Sierra* doctrine, invoked by defendant and defendant intervenors, holds that the FCC may abrogate or modify freely negotiated private contracts only if required by the public interest, and requires that the agency make a particularized finding that the public interest requires a modification to or an abrogation of an existing contract. The court is not persuaded that the *Mobile Sierra* doctrine in this context is relevant, particularly given the court's conclusion that the interconnection agreements are not ordinary private contracts that were freely negotiated between the parties. However, even if the doctrine applied, the FCC's order reflects the Agency's finding that the bar on new UNE-P switching orders should take effect immediately since the continued use of the UNE-Platform "hinder[ed] ... genuine facilities based competition and was thus contrary to public policy. *See* TRRO ¶ 218, 236."

Certain of the intervenors, namely Communigroup and MCI, argue that BellSouth "still has to provide [UNE-Platform] under Section 271 , regardless of the elimination of [the UNE-Platform] under Section 251." FN10 The New York Public Utilities Commission considered a similar argument by competitive LECs that even if the incumbent LEC no longer was obliged to provide access to UNE-P under the TRRO determination, it still had an obligation to continue providing such access pursuant to 47 U.S.C. § 271. The Commission rejected the argument, noting that in light of the FCC's decision "to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [was] clear that there is no federal right to 271-based

UNE-P arrangements." This court would tend to agree. It would further observe, though, ***566** that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may "(i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to subchapter V of this chapter; or (iii) suspend or revoke such [company's] approval" to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

FN10. Section 271 of the Telecommunications Act appears in a section entitled "Special Provisions Concerning Bell Operating Companies," 47 U.S.C. § § 271 to -276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT & T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c).

[4] Based on the foregoing, the court concludes that BellSouth has established a substantial likelihood that it will succeed on the merits of its claim. FN11 The court also concludes that BellSouth has shown that it will suffer irreparable harm if injunctive relief is not granted. BellSouth has offered proof, unrefuted by the PSC or defendant intervenors, that it is losing more than 5,000 customers a month to UNE-Platform competitors. The opponents of BellSouth's motion argue that this loss can be adequately redressed by an award of monetary relief; yet as BellSouth points out, at the end of the case, this court cannot simply give BellSouth back the customers it has lost, and the monetary loss attending the loss of customers can be difficult, if not impossible to quantify. *See Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991) (recognizing that the "Fifth Circuit has held that the loss of customers and goodwill is an 'irreparable injury,' " and agreeing that where there has been a loss of a party's long-time customers, the injury is "difficult, if not impossible, to determine monetarily") (citations omitted). *See also BellSouth v. MCIMetro Access*, 2005 WL 807062, at *3 (finding that BellSouth had demonstrated the existence of "very significant immediate and irreparable injury"); *Illinois Bell Telephone Co. v. Hurley*, 2005 WL 735968, at *7 (agreeing with SBC that "it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages").

FN11. As did the **Georgia** court in *BellSouth v. MCIMetro Access*, 2005 WL 807062, in concluding that BellSouth has sustained its burden as to the first requisite for injunctive relief, the court "does not reach the issue whether an 'Abeyance Agreement' between BellSouth and [Nuvox, KMC and Xpedius] authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it."

As for the issue of whether the threatened injury to BellSouth outweighs the threatened harm to the defendant intervenors, the court is persuaded that the competitors have alternative means of competing with BellSouth and that while "some competitive LECs may suffer harm in the short-term [if the requested injunction is granted], they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy." *BellSouth v. MCIMetro Access*, 2005 WL 807062 (observing that "paragraph 218 of the Order on Remand states that the UNE Platform 'hinder[s] the development of genuine, facilities-based competition,' contrary to the federal policy reflected in the Telecommunications Act of 1996."); *see also* State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order*, Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (stating that "any harm claimed by the CLECs to be irreparable***567** today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."). FN12

FN12. The court would further note that the competitive LECs have been on notice since

> at least August 2004 of the possibility that a time would soon come when they would be precluded from placing new orders for switching UNEs. *See 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, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

The fourth and final requisite for injunctive relief requires that BellSouth demonstrate that granting the preliminary injunction will not disserve the public interest. The FCC determined in its Order that there is a strong public interest in "providing ... consumers with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching," and indeed, it specifically declared that it would be "contrary to the public interest" to delay the effectiveness of its order. TRRO ¶ 236. The court is unpersuaded that there is a sufficient countervailing public interest to warrant denial of BellSouth's motion.

Conclusion

Based on the foregoing, it is ordered that BellSouth's motion for preliminary injunction is granted and the PSC is precluded from enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching.

S.D.Miss.,2005.
Bellsouth Telecommunications, Inc. v. Mississippi Public Service Com'n
368 F.Supp.2d 557

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	Civil Action No. 3:05-CV-16-JMH
v.	)	
CINERGY COMMUNICATIONS CO., a/k/a CINERGY COMMUNICATIONS, CORP., ET AL.	)	**MEMORANDUM OPINION AND ORDER**
Defendants.	)	

** ** ** ** **

This matter is before the Court on Plaintiff's motion for a preliminary injunction [Record No. 2]. Having reviewed the motion, responses, reply, and voluminous record, and having heard oral argument on the matter on April 18, 2005, the Court finds that a preliminary injunction is warranted.

I. Factual and Procedural Background

The Telecommunications Act ("the Act") places a duty on incumbent local exchange carriers ("ILECs"), like the plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), that have traditionally provided local telephone services to an area, to lease unbundled network elements ("UNE") on a cost basis to new entrants into the market, called competitive local exchange carriers ("CLECs"). 47 U.S.C. § 251. The Act authorizes the Federal Communications Commission ("FCC" or "the Commission") to determine the network elements and the proper candidates for this

low rate of services. A "network element" is defined as "a facility or equipment used in the provision of a telecommunications services." *Id.* The unbundled network elements platform ("UNE-P") is composed of switching functions, shared transport, and loops. The only network element at issue in the preliminary injunction is switching.

The Act states that the FCC should consider "at a minimum, whether ... access to such network elements as are proprietary in nature is necessary; and ... [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.*

In the late 1990s, the FCC imposed blanket unbundling, which is requiring ILECs to make available as UNEs, *all* or a certain listed number of the piece parts of their local networks in certain geographic areas. The Supreme Court invalidated this practice in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), because the FCC had not properly considered whether unbundling was necessary or whether the CLECs were impaired. *Id.* at 388-92.

In response, the FCC ruled that impairment was shown if without unbundling, the CLEC's ability to provide services was materially diminished. *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 419 (D.C. Cir. 2002) ("*USTA I*"). The D.C. Circuit subsequently struck the FCC's attempt to correct their

interpretation of "impair" and held that the FCC must differentiate between cost disparities for entrants into *any* market and the telecommunications market. *Id.* at 426-27.

The FCC then issued a Review Order that held that CLECs were impaired without unbundled access to ILEC switches for the mass market, but delegated to each state the authority to make more nuanced impairment determinations. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) ("*USTA II*").

The D.C. Circuit in *USTA II* vacated the FCC rule allowing states to conduct impairment analyses as well as the Commission's national finding of impairment for mass market switching. The court found that the ultimate authority to determine impairment lies with the FCC and, thus, delegation to the states was improper. Further, the court held the Commission's national finding of impairment was improper because it was impermissibly broad. *Id.* at 569-72.

Subsequently, the FCC issued the Order on Remand, the Order at issue in this case, which held that CLECs "are not impaired in the deployment of switches" and that "the 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." Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket

No. 01-338, FCC 04-290, at ¶ 112 (FCC Feb. 4, 2005) ("Order on Remand").

The Order on Remand stated that "[g]iven the need for prompt action, the requirements ... shall take effect on March 11, 2005." *Id.* at ¶ 134. The Order discussed a transition plan for "embedded" or existing customers, wherein CLECs must submit orders to convert to alternative service arrangements in which time the parties would modify their interconnection agreements. The time period set for the transition was twelve months. *Id.* at ¶¶ 128-29.

Prior to the Order on Remand, BellSouth filed a petition with the Kentucky Public Service Commission ("PSC") to establish a generic docket, asking it to decide whether interconnection agreements pursuant to §§ 251 and 252 of the Act were deemed amended on the effective date of the FCC Unbundling Rules, to the extent the rates in the agreements conflicted with rates in the FCC Order.

As soon as the Order on Remand was issued and prior to resolution of the generic petition it filed with the PSC, BellSouth notified CLECs that as of March 11, 2005, it would no longer accept *new* switching orders to those facilities that were not required by the FCC order. Cinergy, one of the defendants in this case, filed a motion for emergency relief to the PSC, requesting that the Commission order BellSouth to continue accepting and processing their orders, including *new* orders pursuant to the change of law

provisions in their agreement. Various other CLECs also asked for the same relief.

On March 10, 2005, the PSC issued two orders granting the relief the CLECs requested. Order, *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-00427 (Ky. PSC Mar. 10, 2005); Order, *In re Joint Petition of NewSouth Communications Corp., et al.*, Docket No. 2004-00044 (Ky. PSC Mar. 10, 2005). The PSC found that the change of law provisions in the interconnection agreements controlled and must be followed in order to modify the agreements to reflect changes implemented by the Order on Remand. The PSC rejected BellSouth's position that the Order on Remand was immediately effective on March 11, 2005, for new orders.

BellSouth then filed a complaint in this Court against the PSC and various CLECs seeking declaratory and injunctive relief from the two PSC orders for switching, loops, and transports. BellSouth simultaneously filed an emergency motion for preliminary injunction seeking relief from the PSC orders in so far as the orders refer to switching.[1]

II. Applicable Law

In order to determine whether a preliminary injunction should

[1] Because the motion for a preliminary injunction does not seek relief as to loops or transports, the injunction is inapplicable to the defendant US LEC of Tennessee, Inc.

be granted, the Court considers the following factors:

> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000). The factors are not prerequisites to entry of a preliminary injunction, but instead should be balanced against each other. *Id.*; *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). The party seeking a preliminary injunction has the burden of persuasion to show that the factors weigh in favor of the Court granting the motion. *Leary*, 228 F.3d at 739. While the Court balances the factors, the plaintiff must prove irreparable harm in order to obtain an injunction. *ExtraCorporeal Alliance, LLC v. Rosteck*, 285 F. Supp. 2d 1028, 1040 (N.D. Ohio 2003).

A. Strong Likelihood of Success on the Merits

Whether BellSouth has a strong likelihood of success on the merits is dependent on whether the FCC's Order on Remand is self-effectuating for new orders or whether it should be effectuated through the change of law process in the defendants' interconnection agreements. BellSouth asserts the former, while the defendants assert the latter.

After a thorough review of the language in the Order on Remand, the Court finds that BellSouth has a strong likelihood of success on the merits. For example, the Executive Summary in the

Order on Remand states that:

> Incumbent LECs have *no obligation* to provide competitive LECs with unbundling access to mass market local switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundling mass market local circuit switching. This transition plan applies only to the embedded customer base, and *does not permit competitive LECs to add new switching UNEs*.

Order on Remand at ¶ 5 (emphasis added). The Order on Remand also states that the Commission "impose[s] no section 251 unbundling requirement for mass market local circuit switching nationwide." *Id.* at ¶ 199. Concerning the effective date, the Order on Remand states that "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." *Id.* at ¶ 235. The strong language in the Order on Remand that ILECs no longer have an obligation to provide UNE-P switching and the corresponding effective date of March 11, 2005, will likely lead the Court to conclude that Order on Remand is self-effectuating for new orders.

Further, the Order reiterates that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." *Id.* at ¶ 227. During the transition period, ILECs are paid a higher rate for existing orders than that paid prior to the Order on Remand. *Id.* at ¶ 228. 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 accepted, it is possible that BellSouth would be processing *new* orders longer than it is required to accept *existing* orders at the lower prices mandated by the interconnection agreements.

The defendants point to paragraph 233 which provides:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in necessary delay.

Order on Remand at ¶ 233 (emphasis added). The defendants argue that the language in this paragraph should be read to mean that the transition plan applies to existing orders and that new orders should be effected pursuant to the parties' interconnection agreements, focusing on the sentence "carriers must implement changes to their interconnection agreements consistent with our

conclusions in this Order." *Id.*

This paragraph, however, should be read in the context of the entire Order on Remand and not in isolation. BellSouth is likely to succeed in arguing that the language "carriers must implement changes to their interconnection agreements *consistent with our conclusions in this Order*" simply refers to existing customers that, pursuant to the transition plan, must be effectuated through the change of law processes in the interconnection agreements. The paragraph should also be read together with the mandate that the transition plan shall only apply to existing orders and that the Order on Remand shall be effective March 11, 2005, "[g]iven the need for prompt action." *Id.* at ¶ 235.

The defendants also argue that paragraph 227's statement that the transition plan does not permit "new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order*" refers to paragraph 233's mandate that interconnection agreements be used to effectuate the process. The more reasoned analysis, however, is that paragraph 227 refers to paragraph 228 that states "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." *Id.* at ¶ 228. Thus, paragraph 227 is interpreted to mean that parties are free to negotiate a longer or shorter transition period.

The Court is not alone in its analysis of BellSouth's likelihood of success; two of the four district courts that have dealt with this issue have ruled similarly. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs.*, LLC, No. 1:05-CV-0674, at 1-6 (N.D. Ga. April 5, 2005) (granting injunction to BellSouth); *BellSouth Telecomms., Inc. v. Miss. Pub. Serv. Comm'n,* No. 3:05-CV-173, at 6-11 (S.D. Miss. April 13, 2005) ("*Miss. PSC*") (granting injunction to BellSouth); *contra MCIMetro Access Transmission Servs., LLC v. Mich. Bell Tel. Co.*, No. 05-CV-709885 (E.D. Mich. Mar. 11, 2005) (order without opinion that grants an injunction to CLECs, but is later withdrawn due to parties' settlement); *Ill. Bell Tel. Co. v. Hurley*, No. 05-C-1149, at 7-12 (E.D. Ill. Mar. 29, 2005). Further, a clear majority of state commissions have agreed that the Order on Remand is self-effectuating for new orders.[2]

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[2] For instance, Indiana, New York, Ohio, California, New Jersey, Texas, Rhode Island, Kansas, Massachusetts, Michigan, and Maine all are in accord with BellSouth's interpretation of the Order on Remand. See *Miss. PSC*, No. 3:05-CV-173, at 8-9 n.6, for commission orders cited therein. Delaware, North Carolina, and Florida also have held that the Order on Remand is self-effectuating for new orders. *See* Open Meeting, *Complaint of A.R.C. Networks, Inc., d/b/a/ InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 22, 2005); Notice of Decision and Order, *In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, Sub-1550, at 4-5 (N.C. PSC Apr. 15, 2005); Vote Sheet, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, at Issue 2 (Fla. PSC Apr. 5, 2005).

The defendants assert that even if the Order on Remand is read to conclude that new orders are not permitted, the FCC is without authority to abrogate interconnection agreements. This is a collateral attack that is not appropriately before the Court and should instead be brought as a direct appeal of the FCC's Order. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004).

Even if this is not a collateral attack on the FCC's Order, the FCC had authority to mandate that the Order on Remand would be self-effectuating for new orders because the FCC has been given the authority to implement the Act. *Iowa Utils. Bd.*, 525 U.S. at 385. Thus, "[t]o the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation

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Commissions that agree with the Kentucky PSC are Tennessee, Louisiana, Illinois, Alabama, and South Carolina. *See* Transcript of Proceedings, *In re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 (Tenn. PSC Apr. 11, 2005); Letter, *Staff's Recommendation Regarding MCI's Motion for Emergency Relief*, Docket No. 28131 (La. PSC 2005); *Illinois Bell Telephone Co. v. Hurley*, Docket No. 05-C-1149, at 7-12 (N.D. Ill. Mar. 29, 2005); Order, *Temporary Standstill Order and Order Scheduling Oral Argument*, Docket No. 29393 (Ala. PSC Mar. 9, 2005); *Commission Directive, Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (S.C. PSC Apr. 13, 2005) (merely establishing ninety day period within which ILECs must continue to accept new orders from CLECs).

controls under the Supremacy Clause." *Miss. PSC*, No. 3:05-CV-173, at 15 (citing *MCI Telecommuns. Corp. v. Bell Atl.-Penn. Serv.*, 271 F.3d 491, 516 (3d Cir. 2001)). Further, the FCC was merely undoing the effect of its prior repudiated rules that were negotiated into the regulated interconnection agreements.[3] *Id.* at 13-14.

While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first. *Miss. PSC*, No. 3:05-CV-173, at 17.

Lastly, the NewSouth joint defendants argue that they are not subject to the preliminary injunction because an Abeyance Agreement and subsequent Abeyance Order was entered by the PSC that specifically states that the joint defendants and BellSouth agree

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[3] The defendants argue that the only way the FCC may abrogate contracts is through the *Mobile-Sierra* doctrine, which has not been followed because the FCC did not make a particularized finding that abrogating the contracts was in the public interest. However, the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the *Mobile-Sierra* doctrine is not applicable. *See e.g., Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 14 (D.C. Cir. 2002) (The *Mobile-Sierra* doctrine provides authority to federal agencies to abrogate "freely negotiated private contracts" provided the agency makes "a particularized finding that the public interest required the modification" of the contracts.). *See also e.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (holding that interconnection agreements are not private contracts but, instead, arise from ongoing federal and state regulations).

that their prior interconnection agreements would be in place until the change of law resulting from the *USTA II* progeny was incorporated into new agreements. As the two district courts dealing with the exact issue have held, this Court does not have to reach whether the Abeyance Agreement and Order authorizes new orders to be placed because this very issue is before the PSC. Thus, our decision on the preliminary injunction "does not affect the PSC's authority to resolve it." *MCIMetro, No. 1:05-CV-0674, at 6; Miss.* PSC, No. 3:05-CV-173, at 17-18 n.11.

B. Balancing the Harms

In deciding whether a preliminary injunction is appropriate, the Court must balance the harm to the plaintiff if the injunction is denied and the harm to the defendants if the injunction is granted. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001). The harm to the plaintiff must be irreparable; it is not sufficient if the plaintiff merely shows that it will suffer economic damages in the absence of an injunction. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). An injunction is inappropriate, thus, if the plaintiff will suffer purely economic harm that is compensable through monetary damages. "[A]n exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Performance Unlimited, Inc. v. Questar Publ'rs, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995).

1. Harm to BellSouth

The defendants argue that BellSouth has only asserted damages that are fully compensable with a monetary award. The defendants assert that the damages are readily calculable by comparing the higher rate BellSouth would be able to charge CLECs for new UNE-P switching orders versus the lower rate BellSouth is required to charge pursuant to the interconnection agreements.

The defendants' argument misses the mark because the plaintiff does not merely assert monetary damages. It is true that BellSouth alleges damages flowing from the difference in price between the lower price mandated by the interconnection agreements and the higher price the company could charge if the bar on unbundling was immediately lifted. These damages alone would not be sufficient to warrant an injunction because they are readily calculable.

BellSouth, however, also alleges damages resulting from an inability to compete with the CLECs who can offer services at a lower rate than BellSouth because of the low cost of switching. As a result, BellSouth asserts that it will lose customers and goodwill if an injunction is not granted. BellSouth submitted proof that it would lose approximately 943 customers a week without an injunction. The defendants did not controvert this proof, but assert that the damages flowing from loss of customers are monetary.

The Court agrees with BellSouth that the damages flowing from

loss of customers is irreparable because it is impossible to predict the probable length of the lost customers' relationships with BellSouth or whether the customers would return to BellSouth after a decision on the merits in BellSouth's favor. *Basicomputer*, 973 F.2d at 512 (holding that "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute"); *Mich. Bell Tel. Co.*, 257 F.3d at 599 (noting that "loss of established goodwill may irreparably harm a company"); *Lexington-Faytte Urban County Gov't v. BellSouth Telecomms., Inc.*, No. 00-5408, 2001 WL 873629, at *3 (6th Cir. July 26, 2001) (holding that the lower court did not abuse discretion in finding that BellSouth suffered irreparable harm through loss of customers because of a delayed entry into the marketplace) (unpub.); *Ferro v. Ass'd Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (finding that the movant established irreparable injury through loss of customers and good will).

The defendants cite *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991), that upheld a finding of a lack of irreparable harm through loss of customers. In *Southern Milk*, an agricultural cooperative brought suit to enjoin a competitor from interfering with cooperative agreements that provided the plaintiff with the exclusive rights to act as the sole agent for dairy farmers in Michigan. The Sixth Circuit held that there was no irreparable harm because the market was not limited and it was

unclear whether an injunction would prevent customers from taking their business elsewhere. *Id.*

Southern Milk is contrary to later Sixth Circuit cases, cited by the Court above, that hold that irreparable harm may be found from loss of customers and goodwill and fail to mention a "limited market" exception. In two cases in particular, the movants were telecommunications companies and the Sixth Circuit upheld the lower courts' finding of irreparable harm due to loss of customers and goodwill without mentioning whether the market was limited. *Mich. Bell Tel. Co.*, 257 F.3d at 599; *Lexington-Fayette Urban County Gov't*, 2001 WL 873629, at *3. Because the cases conflict, the Court follows the later cited cases that uphold findings of irreparable harm from loss of customers and goodwill where a telecommunication company is concerned.

2. Harm to CLECs

The CLECs maintain that if an injunction is entered, they will suffer harm that far outweighs any harm suffered by BellSouth if the motion is denied. Specifically, the CLECs state that granting the injunction will upset the status quo instead of maintaining it; will deny the CLECs meaningful opportunities to negotiate the interpretation of the Order on Remand; would cause the CLECs to lose customers and goodwill from the inability to receive UNE-P services at a lower rate; and would result in customers being immediately be cut off from ordering new services.

BellSouth argues that the CLECs' only harm is the harm resulting from not being able to receive unbundling services for new orders at the lower rate mandated by the interconnection agreements. This harm, BellSouth argues, should not be balanced because requiring ILCEs to provide unbundling services to CLECs at a lower cost is contrary to the federal public policy of barring unbundling because it is anti-competitive. Additionally, BellSouth argues that the status quo was established by the Order on Remand and upset by the PSC orders.

The Court agrees with the plaintiff. The Order on Remand establishes the federal policy of not requiring unbundling of switches for new orders. The CLECs' interest in a practice the FCC has stated is "anti-competitive" has very little weight, if any, in balancing the harms. *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (Analyzing the defendants' motion for a stay of the district court's order compelling arbitration, the Seventh Circuit held that a stay would be improper because it would be contrary to "strong federal policy in favor of arbitrating disputes.").

Finally, the "status quo" will not be disrupted because the CLECs were on notice that no new UNE-P orders for switching may be accepted because the Interim Order stated that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates."

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, at ¶ 29 (FCC Aug. 20, 2004). The Order on Remand also stated that the Order was effective immediately on March 11, 2005. Order on Remand at ¶ 235. Thus, while the CLECs are correct in arguing that the status quo established by the PSC orders will be disrupted by an injunction, the status quo established by the Order on Remand is maintained by an injunction.

C. Public Interest

BellSouth argues that the public interest is furthered by an injunction because it favors facilities-based competition, the ultimate goal of the Act. The defendants, on the other hand, argue that the public interest favors denying an injunction because the public may lose access to new services provided through CLECs. The defendants also state that the public interest in stability of contracts and in competition would be harmed. Additionally, the defendants argue that the public interest in an orderly transition and the PSC's ability to interpret interconnection agreements would be harmed by an injunction.

While entering an injunction may cause some disruption in service to CLEC customers, the FCC has stated the federal policy of encouraging facilities-based competition is disparaged by mandating unbundling services to CLECs. As such, the public interest favors

entry of a preliminary injunction that reflects that policy. Further, an injunction does no more harm to the PSC's ability to interpret federal telecommunications law or interconnection agreements, than do the processing of appeals for PSC orders authorized by the Act.

III. Conclusion

Based on the foregoing, the Court finds that all four factors weigh in favor of granting an injunction.

Accordingly, **IT IS ORDERED:**

(1) That Plaintiff's motion for preliminary injunction [Record No. 2] be, and the same hereby is, **GRANTED**; and

(2) That the defendants be, and the same hereby are, **ENJOINED** from enforcing the portion of the PSC orders dated March 10, 2005, that require BellSouth to continue to process new orders for UNE-P switching.

This the 22nd day of April, 2005.

Signed By:
Joseph M. Hood
United States District Judge

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

ADMINISTRATIVE SESSION

Hearing Room 110
244 Washington Street
Atlanta, Georgia

Thursday, November 17, 2005

The administrative session was called to order at 10:00 a.m., pursuant to Notice.

PRESENT WERE:

ANGELA E. SPEIR, Chairman
ROBERT B. BAKER, JR., Vice Chairman
STAN WISE, Commissioner
H. DOUG EVERETT, Commissioner
DAVID BURGESS, Commissioner

COMMISSIONER BURGESS: Aye.

CHAIRMAN SPEIR: Opposed.

COMMISSIONER WISE: Aye.

CHAIRMAN SPEIR: No.

All right, so voting in favor of Commissioner Everett's motion as amended are Commissioners Burgess, Baker and Everett. Opposed: Commissioners Speir and Wise.

Commissioner Everett's motion passes.

That concludes the Atmos rate case decision. Thank you, Mr. Ellison.

We will now turn our attention to Mr. Walsh for item R-7. And it is still good morning, Mr. Walsh, almost afternoon.

MR. WALSH: Thank you, Madam Chair.

Item R-7 is Docket Number 19341-U, Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements. Consideration of staff recommendation to vacate the March 9, 2005 order.

On March 9, 2005, the Commission issued an order on MCI's motion for emergency relief concerning UNE-P orders. The order required all carriers to abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order.

BellSouth appealed the order to the Federal

District Court for the Northern District of Georgia. The Court granted BellSouth's request for an injunction against the Commission enforcing the order. In granting the injunction, the Court found that BellSouth had demonstrated that it had a substantial likelihood of success on the merits. The Eleventh Circuit Court of Appeals upheld the injunction.

The staff recommends that the Commission vacate the portion of its March 9, 2005 order that requires all carriers to abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order. As was discussed at the Telecommunications Committee on Thursday, the staff's recommendation does not involve issues regarding parties' rights pursuant to separate abeyance agreements that were not addressed in the March 9 order. The recommendation vacates the portion of the order that the Commission has been enjoined from enforcing. The recommended vacatur would only address the dispute over whether the parties were obligated to abide by the change of law provisions in the interconnection agreements with regard to new orders for unbundled local switching and dedicated loop and transport.

CHAIRMAN SPEIR: Thank you very much, Mr. Walsh.

Any questions or comments for Mr. Walsh on this item?

(No response.)

CHAIRMAN SPEIR: Hearing none, all in favor of approving staff's recommendation on item R-7, please say aye.

COMMISSIONER WISE: Aye.

COMMISSIONER EVERETT: Aye.

CHAIRMAN SPEIR: Aye.

VICE CHAIRMAN BAKER: Aye.

COMMISSIONER BURGESS: Aye.

CHAIRMAN SPEIR: Any opposed?

(No response.)

CHAIRMAN SPEIR: It's approved unanimously.

We'll now turn our attention to our Transportation agenda. We have a consent agenda and one regular item this morning.

Any questions or comments on the consent agenda, or would any Commissioner like any item to be moved to the regular agenda?

VICE CHAIRMAN BAKER: Just one question for clarification. We got a revised agenda and I was trying to find out where the revision is and where the change is from the original agenda. Could you point that out to me?

CHAIRMAN SPEIR: Ms. Montrelle, good morning. We welcome you to the podium. You weren't expecting to stand there this morning I know.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law Provide Unbundled Network Elements	))))	Docket No. 04-00381

MCI'S MOTION FOR EXPEDITED RELIEF CONCERNING UNE-P ORDERS

MCImetro Access Transmission Services, LLC ("MCI") files this Motion with the Tennessee Regulatory Authority ("Authority" or "TRA") for Emergency Relief Concerning UNE-P Orders because BellSouth Telecommunications, Inc. ("BellSouth") has stated that it intends to take actions that will breach its interconnection agreement ("Agreement") with MCI. Specifically, BellSouth has stated that it will reject UNE-P orders beginning March 11, 2005 pursuant to its interpretation of the FCC's recently issued Triennial Review Remand Order ("*TRRO*"). This course of action would breach MCI's Agreement in at least two respects: (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. Contrary to statements in BellSouth's Carrier Notifications that have been issued to competitive local exchange carriers ("CLECs"), including MCI, the *TRRO* does not excuse or justify BellSouth's stated intention of rejecting MCI's UNE-P orders beginning March 11, 2005 and ignoring the change of law process with respect to such UNE-P orders.

MCI wishes to continue placing UNE-P orders in Tennessee after March 10, 2005. Unless the Authority declares that BellSouth may not reject such UNE-P orders,

and instead must comply with the change of law provision in its Agreement, MCI will sustain immediate and irreparable injury. MCI therefore requests that the Authority consider this matter on an expedited basis and grant the relief requested in this Motion.

As stated below, three state public service commissions have issued rulings to date on similar motions that MCI has filed in those states. The Georgia Public Service Commission unanimously directed BellSouth to continue providing UNE-P pursuant to the parties' interconnection agreements. The Alabama Public Service Commission unanimously voted to require BellSouth to continue providing UNE-P under MCI's interconnection agreement until the commission can consider that matter further at a subsequent session. The Louisiana Public Service Commission voted to authorize its staff to issue a temporary restraining order against BellSouth if appropriate until the commission can consider MCI's motion at its next meeting.

The next regularly scheduled agenda conference for the Authority is March 14, 2005 – i.e., three days after the March 11th cutoff date for new UNE-P orders. Accordingly, MCI requests that the hearing officer in this proceeding issue a stay order before March 11, 2005, so that the rights of MCI's and similarly-situated CLECs will be not adversely affected before the Directors can consider the Motion on March 14, 2005 or on such other day as may be appropriate.

PARTIES

1. MCI is a Delaware company with its principal place of business at 22001 Loudoun County Parkway Ashburn, VA 20147. MCI has a Certificate of Authority issued by the Authority that authorizes MCI to provide local exchange service in

Tennessee. MCI is a "telecommunications carrier" and "local exchange carrier" under the Telecommunications Act of 1996 ("Federal Act").

2. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("incumbent LEC"), as defined in Section 251(h) of the Federal Act and is an incumbent local exchange carrier and telecommunications service provider as defined by T.C.A. §65-4-101 (4) & (8).

JURISDICTION

3. MCI and BellSouth are subject to the jurisdiction of the Authority with respect to the matters raised in this Motion.

4. The Authority has jurisdiction with respect to the matters raised in this Motion under T.C.A. §4-5-223 (jurisdiction of Authority to issue declaratory order); T.C.A. §65-4-104 (conferring general supervisory and regulatory jurisdiction over public utilities, and enabling the Authority to issue declaratory rulings); T.C.A. §65-4-106 (liberal construction of laws in favor of the Authority's jurisdiction); T.C.A. §65-4-117 (power to fix just and reasonable rates); T.C.A. §65-4-119 (authority to hear complaints); T.C.A. §65-4-123 (no unreasonable prejudice to telecommunications service providers), T.C.A. §65-4-124 (Authority to provide for unbundling of service elements and functions); T.C.A. §65-5-109 (incumbent LECs to charge just and reasonable rates); and T.C.A. §65-5-110 (authority to hear contested cases and enter appropriate orders)

5. The Authority also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order

or policy that is consistent with the requirements of Section 251) with respect to the matters raised in this Motion.

FACTS

6. MCI and BellSouth entered into the Agreement on or about June 17, 2002, which was approved by the Authority in Docket No. 00-00309. The Agreement provides that BellSouth shall provision UNE combinations including "the combination of Network Element Platform or UNE-P." (Agreement, Att. 3, § 2.4.) The Agreement goes on to provide that "[t]he price for these combinations of Network Elements shall be based upon applicable FCC and TRA rules and shall be set forth in Attachment 1 of this Agreement." (*Id.*) The parties incorporated the UNE rates adopted by the Authority in Docket No. 97-01262. Those rates remain in effect today.

7. The Agreement specifies the steps to be taken if a party wishes to amend the Agreement because of a change in the law. The Agreement provides:

> In the event that any effective and applicable legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of MCIm or BellSouth to perform any material terms of this Agreement, or imposes new or modified rights or obligations on the Parties, or makes any provision hereof unlawful, or in the event a judicial or administrative stay of such action is not sought or granted, MCIm or BellSouth may, on thirty (30) days written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and effective) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. 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) of this Part A.

(Agreement, Part A, § 2.3.)

8. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. The Agreement's dispute resolution provision provides as follows:

> The Parties recognize and agree that the Commission has continuing jurisdiction to enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. Either Party may seek expedited resolution by the Commission. . . . During the Commission proceeding each Party shall continue to perform its obligations under this Agreement; provided, however that neither Party shall be required to act in any unlawful fashion. This provision shall not preclude the Parties from seeking relief available in any other forum.

(Agreement, Part A, § 22.1.)

9. In August 2003 the FCC released its Triennial Review Order ("*TRO*") that found impairment nationally with regard to mass markets local switching, but requested a granular review by state public service commissions of the conditions for competitive local exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate issued, great uncertainty arose as to whether BellSouth would continue to process UNE-P orders.

10. On March 23, 2004, BellSouth issued a Carrier Notification stating that *USTA II* "vacated the FCC's rules associated with, among other things, mass-market switching thereby eliminating BellSouth's obligation to provide unbundled switching and, therefore, Unbundled Network Elements-Platform at TELRIC rates." BellSouth's

Carrier Notification further noted that the court's order eliminating its obligation to provide UNE-P would become effective on May 1, 2004. Because of the uncertainty generated by this Carrier Notification and other statements by BellSouth, XO Tennessee, Inc. petitioned for a declaration from the Authority in Docket No. 04-00158, requiring that BellSouth continue to honor CLECs' interconnection agreements and preventing BellSouth from restricting access to UNEs or unilaterally changing its UNE rates. The Competitive Carriers of the Southeast, Inc. petitioned to intervene. BellSouth then gave assurances that it would not unilaterally breach its interconnection agreements, and that it intended to pursue modification, reformation or amendment of existing agreements. (See BellSouth's Response to Petition for Declaratory Ruling, pp. 4-5.) BellSouth also acknowledged the CLECs' request for "an orderly transition," but asked for an abeyance of the proceeding and for resolution of the issues in a generic docket. (*Id.*, p. 14.). Because of these assurances the Authority dismissed the petition, without prejudice.

11. On October 29, 2004, BellSouth filed its Petition to Establish a Generic Docket, in order to engage in a change of law process to modify existing interconnection agreements. In response to BellSouth's petition, the Commission established this proceeding to determine the changes that recent decisions by the FCC and the D.C. Circuit will require in existing interconnection agreements between BellSouth and CLECs. Issues that have been identified by BellSouth include the rates, terms and conditions for network elements that are no longer required to be unbundled under section 251 of the Federal Act. (See BellSouth's Petition to Establish Generic Docket, issue matrix p. 2.)

12. The FCC issued the *TRRO* on February 4, 2005. The FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of the *TRRO*. (*TRRO* § 227.) The FCC determined that the price for section 251(c)(3) unbundled switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar. (*TRRO* § 228.)

13. With respect to new UNE-P orders after the effective date of the *TRRO*, the FCC stated: "The 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*." (*TRRO* § 227.) (Emphasis added.)

14. The *TRRO* does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage

> the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted.)

15. BellSouth issued a Carrier Notification dated February 8, 2005 in which it notified CLECs that the *TRRO* had been released. Among other things, BellSouth stated that the *TRRO* "precludes CLECs from adding new UNE-P lines starting March 11, 2005." A true and correct copy of the February 8 Carrier Notice is attached hereto as Exhibit A.

16. In an attempt to clarify BellSouth's intent, on February 11, 2005 MCI sent a letter to BellSouth asking whether BellSouth intended to reject its UNE-P orders or charge a higher rate for new UNE-P lines if MCI did not sign a "commercial agreement" with BellSouth by March 11, 2005. An unsigned copy of MCI's February 11 letter is attached hereto as Exhibit B.

17. BellSouth issued a second Carrier Notification dated February 11, 2005 in which it expanded on its interpretation of the *TRRO*. BellSouth claimed that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for these former UNEs." BellSouth went on to state that "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." A true and correct copy of the February 11 Carrier Notice is attached hereto as Exhibit C.

18. BellSouth issued a change request along with the February 11 Carrier Notice that creates a new edit in its operations support systems to reject all new orders for UNE-P effective March 11, 2005. A true and correct copy of the change request is attached hereto as Exhibit D.

19. BellSouth responded to MCI's February 11 letter in a February 17, 2005 e-mail that referred MCI to the February 11 Carrier Notification.

20. By letter dated February 18, 2005, MCI responded to the February 11 Carrier Notification. MCI notified BellSouth that the actions it threatens would constitute breaches of the Agreement. MCI requested BellSouth to provide adequate assurance by February 25, 2005 that it will perform the Agreements. No such assurance has been given. MCI also informed BellSouth that it might file legal pleadings before BellSouth responded to the letter. MCI stated that it remains willing to resolve this matter outside the legal process. A true and correct copy of MCI's February 18 letter is attached hereto as Exhibit E.

21. On February 23, 2005, MCI sent a letter to BellSouth requesting that the parties negotiate to implement the change of law necessitated by the *TRRO*. In that letter, MCI noted that the negotiation and amendment process "need not be a lengthy process." MCI's letter is attached hereto as Exhibit F. MCI has not yet received a response from BellSouth.

22. On February 25, 2005, BellSouth amended its notification of February 11, 2005. A copy of the amendment is attached hereto as Exhibit G.

BELLSOUTH'S REFUSAL TO ACCEPT AND PROCESS ORDERS

23. The Agreement requires BellSouth to provide UNE-P to MCI at the rates specified in the Agreement. (Agreement, Att. 3, § 2.4.) Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision MCI's UNE-P orders at the specified rates. By stating that it will not accept UNE-P orders beginning March 11, 2005, BellSouth has breached the Agreement.

24. The *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept MCI's UNE-P orders beginning March 11, 2005, because the *TRRO* requires that its rulings be implemented through changes to parties' interconnection agreements. Implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, BellSouth's duty to continue to provide UNE-P to MCI at current rates under state law and under section 271 of the Federal Act.

BELLSOUTH'S REFUSAL TO FOLLOW THE CHANGE OF LAW PROCESS

25. The Agreement does not permit parties to implement changes in law unilaterally. To the contrary, the Agreement requires that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. (Agreement, Part A, § 22.1.) By stating its intention to ignore the change of law provision in the parties' Agreement, BellSouth has breached the Agreement.

26. The *TRRO* does not excuse or justify BellSouth's failure to comply with the change of law provisions of the Agreement. The *TRRO* requires that parties "implement the [FCC's] findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (*TRRO* § 233.) The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement. Under the *TRRO* and the Agreement, therefore, BellSouth must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders. Accordingly, the Authority must make clear that BellSouth cannot unilaterally shut off MCI and other CLECs on March 11, 2004, as it has promised to do.

27. Foremost among the difficult issues that the parties must resolve through negotiation and arbitration are (i) whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and rates under Tennessee state law and (ii) whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and rates under section 271 of the Federal Act. It was precisely because parties and state commissions must resolve these and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the parties' interconnection agreements. And, as shown below, they also serve as independent grounds for continuing to enforce the Agreement as written and approved.

A. BellSouth's Duty to Provide UNE-P Under State Law

28. Even if BellSouth were empowered by the *TRRO* unilaterally to change MCI's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the Agreement

unilaterally because the Tennessee Act and the orders the Authority has issued pursuant to the Tennessee Act independently support MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement.

29. In approving the Agreement, the Authority based its jurisdiction in part on T.C.A. §65-4-104. Order Approving Interconnection Agreement, Docket No. 00-00309 (September 20, 2002), pp. 3-4. The Authority in that proceeding also referred to its responsibility under T.C.A. §65-4-123 to assist competition in all telecommunications service markets. See Final Order of Arbitration Award, Docket No. 00-00309 (April 24, 2002), pp. 8-9.

30. When the Authority issued its initial order in the UNE cost case, it made clear that it was establishing UNE rates under its state law authority as well as the Federal Act. The Authority stated:

> In 1995, the Tennessee General Assembly passed landmark legislation dramatically altering the regulation of the telecommunications industry and opening up that industry to tremendous opportunities for competition. This legislation became effective on June 6, 1995, and enlarged the responsibility of this Authority be declaring "that the policy of this state is to foster the development of an efficient, technologically advanced statewide system of telecommunications services by permitting competition in all telecommunications service markets..." Further, the Tennessee Act states that "the regulation of telecommunications services and telecommunications service providers shall protect the interest of consumers without unreasonable prejudice or disadvantage to any telecommunications service providers." *In the course of fulfilling these obligations, the level of UNE prices will have a significant impact on the development of local competition and the expansion of consumer choices associated with competition.*

(Interim Order, Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements, Docket No. 97-01262, pp. 2-3) (January 25, 1999) (footnotes omitted, emphasis added).) Thus the rates that have been incorporated into the

Agreement are independently supported by Tennessee law and the Authority has found these rates to be just and reasonable. Until the Authority changes the UNE rates as a result of evidence demonstrating that new rates are just and reasonable, in this or some other docket, the rates in the Agreement remain in full force and effect.

31. This Authority's authority to require BellSouth to unbundle its network at just and reasonable rates has not been preempted by federal law. Preemption occurs when (i) Congress "occupies the field" in the area the state seeks to regulate; (ii) the federal government expressly preempts state regulation; or (iii) there is a conflict between state and federal law. None of these conditions has occurred.

32. In the *TRO*, the FCC recognized that provisions in the Federal Act preserving state authority demonstrate that Congress did not intend to occupy the field with respect to unbundling. For example, the FCC ruled: "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act." (*TRO* ¶ 192, footnotes omitted.)

33. None of the pronouncements of the FCC in the *TRRO* or the *TRO* demonstrate that agency's intent to preempt the authorization by Tennessee law of state unbundling. Although the *TRO* contained what the D.C. Circuit dubbed the FCC's "general prediction" about when state agency actions regarding unbundling might be preempted, the *USTA II* court held that the "general prediction voiced in ¶ 195 does not constitute final agency action, as the [FCC] *has not taken any view on any attempted state unbundling order*." *USTA II*, 359 F.3d at 594 (emphasis added). The court therefore found claims of preemption based on the *TRO* "unripe," and upheld the FCC's actions

against such claims. *Id.* In the *TRRO*, the FCC addressed "those issues that were remanded to us" by *USTA II*. (TRRO ¶ 19.) Because the D.C. Circuit in *USTA II* found no preemption had been attempted in the *TRO*, preemption was not one of the issues remanded to the FCC for consideration in the *TRRO*.

34. Under the Federal Act, BellSouth is still required to provide access to unbundled local switching under section 271, so a requirement under state law that BellSouth unbundle local switching plainly is consistent with federal law. Moreover, the FCC has held that section 271 checklist elements must be provided at "just and reasonable" rates, the same pricing standard that the Authority employs in establishing telephone rates in Tennessee. This pricing standard therefore does not conflict with federal law and thus this Authority's exercise of unbundling and pricing authority under state law, including but not limited to N.C.G.S. §65-4-124, is not preempted.

35. In any event, however, the proper way to resolve any dispute concerning this point is not self-help on BellSouth's part, but rather by working through the change of law process in the Agreement. Until that process has been completed, BellSouth should not be allowed to change the rates ordered by the Authority and incorporated into the Agreement.

B. <u>BellSouth's Duty to Provide UNE-P Under Section 271 of the Federal Act</u>

36. Even if BellSouth were empowered by the *TRRO* unilaterally to change MCI's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the Agreement unilaterally because section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement.

37. As the FCC affirmed in the Triennial Review Order, so long as BellSouth wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it "must continue to comply with any conditions required for [§271] approval" (*TRO* § 665), and that is so whether or not a particular network element must be made available under section 251. One of the central requirements of section 271 is that a Bell Operating Company enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." (Federal Act, § 271(c)(1)(A).) Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. (*Id.* §271(c)(2)(A)(ii).) That checklist requires that the agreement must provide for local switching. (*Id.* § 271(C)(2)(B)(vi).) To satisfy the requirements of the checklist the interconnection agreement must provide switching at a rate deemed just and reasonable. (*Id.*; *TRO*, ¶¶ 662-664.).

38. In Docket No. 03-00119, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc., with BellSouth Telecommunications, Inc.*, the Authority has expressed recognized its authority under 47 U.S.C. §271 to set just and reasonable rates. See Transcript of Proceedings, June 21, 2005. The Authority therein set an interim rate for local circuit switching in a context other than section 251 unbundling.

39. BellSouth is required to provide section 271 local switching as part of the UNE-P combination. Although the FCC in the *TRO* declined to require BellSouth to combine section 271 local switching with other UNEs pursuant to section 251(c)(3), (*see* TRO ¶ 655 & n.1989), and that decision was upheld in *USTA II*, the D.C. Circuit noted

that the general nondiscrimination requirement of section 202 might provide an independent basis for requiring the combination of section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590. See also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395 (1999) (discussing disconnection of previously combined elements as potentially discriminatory and "not for any productive reason, but just to impose wasteful reconnection costs on new entrants").

40. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because BellSouth owns the loop plant that serves consumers in its service territory. If BellSouth were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other elements needed to provide service, BellSouth would discriminate against CLECs in violation of section 202 of the Federal Act. BellSouth therefore must provide section 271 switching in combination with the other elements that make up UNE-P.

41. MCI submits, therefore, that until this Authority or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271.

RULINGS OF OTHER COMMISSIONS

42. Commissions in other states have supported similar motions filed by MCI. To date three commissions have issued rulings on these motions. On March 1, 2005, the Georgia Public Service Commission unanimously directed BellSouth to continue providing UNE-P pursuant to the parties' interconnection agreements. The staff recommendation that was approved by the Georgia commission is attached as exhibit H. Likewise, the Alabama Public Service Commission unanimously voted on March 1, 2005

to require BellSouth to continue providing UNE-P under MCI's interconnection agreement until the commission can consider that matter further at a subsequent session. The Louisiana Public Service Commission voted on February 23, 2005 to authorize its staff to issue a temporary restraining order against BellSouth if appropriate until the commission can consider MCI's motion at its March 23, 2005 meeting.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, MCI respectfully requests that the Authority:

(1) Order and declare that BellSouth shall continue accepting and processing MCI's UNE-P orders under the rates, terms and conditions of the Agreement;

(2) Order and declare that BellSouth shall comply with the change of law provisions of the Agreement with regard to the implementation of the *TRRO*;

(3) Order such further relief as the Authority deems just and appropriate.

Respectfully submitted, this 2nd of March, 2005.

Boult Cummings [etc.]

Dulaney L. O'Roark, III, Esq.
Kennard B. Woods, Senior Attorney
MCI
Six Concourse Parkway, Suite 600
Atlanta, Tennessee 30328
(770) 284-5497
de.oroark@mci.com
ken.woods@mci.com

Attorneys for MCI

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded electronically and via U.S. Mail, postage prepaid, to:

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

on this the 2nd day of March 2, 2005.

Henry Walker

Exhibit A

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085032

Date: February 8, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Services

On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand ("Order"), which, among other things, relieved Incumbent Local Exchange Carriers ("ILEC") of their obligation to provide unbundled access to mass market switching and Unbundled Network Element-Platform ("UNE-P") services, on a nationwide basis, pursuant to Section 251 of the Act. The Order establishes a twelve-month transition period commencing March 11, 2005, during which CLECs must transition their embedded base of mass market switching and UNE-P lines to alternative arrangements. The Order further precludes CLECs from adding new UNE-P lines starting March 11, 2005.

As a result of these ordered changes, BellSouth would like to inform CLEC customers that through March 10, 2005, the day before the Order becomes effective, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's current market rate for mass market platform services. As of March 11, 2005, although BellSouth will continue to offer commercial agreements for DS0 switching and platform services, the pricing set forth in the current DS0 Agreement will no longer be available.

BellSouth encourages CLECs to contact their negotiator to find out more about its DS0 Agreement while the transitional discounts remain available.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

Exhibit B

Norbert White
Director
Carrier Relations
500 Technology Drive
Weldon Spring, MO 63003
636-793-3028

February 11, 2005

Jerry Hendrix
Assistant Vice President
Bell South Interconnection Services
675 West Peachtree Street
Atlanta, GA 30375

RE: Carrier Notification SN 91085032

Jerry,

Yesterday, we received the above mentioned carrier notification regarding commercial agreements for Bell South DSO Wholesale Local Voice Platform Services. As you are aware, we have been in discussions now for over a month regarding Bell South's wholesale offering and we anticipate continuing those discussions with you. We have two specific questions as to this communication.

- If we have not signed a commercial agreement by March 11, 2005, does BellSouth intend to reject MCI LSRs ordering new UNEP lines?
- If we have not signed a commercial agreement by March 11, 2005, does BellSouth intend to charge MCI a higher rate for those new UNEP lines?

We would appreciate a response to this letter by February 16, 2005.

Sincerely,

Norbert White

BELLSOUTH

Exhibit C

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

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

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

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT D

BELLSOUTH

CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DATE SENT:	02/11/05
CHANGE REQUEST #:	CR2161
STATUS:	S

REQUEST TYPE *Check appropriate field:*											
TYPE 2 (REGULATORY)	X	TYPE 3 (INDUSTRY)		TYPE 4 (BST)		TYPE 5 (CLEC)		TYPE 6 (DEFECT)			

PRIMARY CLEC CHANGE MANAGEMENT POINT OF CONTACT INFORMATION
(Originator of Request and contact for additional details/questions or to whom response will be made)

NAME:	Change Control	TEL NO:	205-714-0727
EMAIL:	Change.Control@BellSouth.com	FAX #:	
COMPANY NAME:	BellSouth	OCN	

SECTION TO BE COMPLETED BY INITIATOR OF REQUEST:

TITLE OF REQUEST:	Triennial Review Remand Order (TRRO) – Unbundling Rules – Ordering of new UNE-P lines

Check appropriate field:

ASSESSMENT OF IMPACT:	HIGH	X	MEDIUM		LOW	

PRE-ORDERING		ORDERING	X	MAINTENANCE		MANUAL	X

INTERFACES IMPACTED:	LENS	X	TAG / XML	X	CSOTS		EDI	X	EC-TA		TAFI	

TYPE OF CHANGE:
Check appropriate field(s):

SOFTWARE	X	PRODUCT & SERVICES		DOCUMENTATION	X	HARDWARE	
REGULATORY		INDUSTRY STANDARDS		PROCESS		NEW OR REVISED EDITS	
DEFECT		EXCEPTION FEATURE		OTHER			

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com

BELLSOUTH

CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DETAILED DESCRIPTION OF REQUESTED CHANGE OR DEFECT DESCRIPTION
In accordance with the Triennial Review Remand Order (TRO), effective March 11, 2005, BellSouth will no longer accept orders requesting new UNE-P without having negotiated a current Commercial Agreement. Please reference Carrier Notification Letter SN91085039, posted February 11, 2005 for specific rules and available options.

REQTYP(s) IMPACTED:	M
ACT TYP(s) IMPACTED:	
PON EXAMPLES:	
ERROR MESSAGE:	
ELECTRONIC MAP VERSION AFFECTED BY CHANGE OR DEFECT:	ELMS6, TCIF9

BELLSOUTH USE ONLY:

BELLSOUTH CHANGE REVIEW MEETING RESULTS (Types 2-5 Only):	
DEFECT VALIDATION RESULTS (Type 6 Only):	
DEFECT WORKAROUND (Type 6 Only):	

VALIDATED DEFECT SEVERITY LEVEL:	2		3		4		

CLARIFICATION SENT:	

TARGET IMPLEMENTATION DATE:	**03/11/05**
ACTUAL IMPLEMENTATION DATE:	

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com

COPY

EXHIBIT E

Michael A. Beach
Vice President – Carrier Management
6415 Business Center Drive
Highlands Ranch, CO 80130
(303) 305-5099

February 18, 2005

Via Overnight Courier & Email

Mr. Jerry Hendrix
Assistant Vice President
Interconnection Services
BellSouth Telecommunications
675 West Peachtree Street
Atlanta, GA 30375

RE: Carrier Notification SN91085039 Dated February 11, 2005

Dear Jerry:

I am writing you in reply to your Carrier Notification referenced above, in which you notify carriers that, effective March 11, 2005, BellSouth will cease accepting orders for, among other things, UNE switching and UNEP. While your letter is generic in nature, in that it is addressed to all carriers, it makes no mention of exceptions to BellSouth's plans. Thus, it does not appear that you intend to give appropriate consideration to existing interconnection agreements you have with any particular carriers.

Please take notice that BellSouth has existing interconnection agreements with various MCI CLEC entities (collectively, "MCIm"). Those agreements require that BellSouth provide UNE switching and UNEP, among other UNEs and UNE combinations. The agreements further require notice, negotiation, and either agreement or dispute resolution leading to an amendment in order to effectuate a change of law.

If BellSouth takes the action, threatened in the Carrier Notification, against MCIm, MCIm will view such action as intentional, willful, repeated breaches of the interconnection agreements, as well as intentional, willful tortious conduct. Such breaches and torts almost certainly would result in serious damages to MCIm, including (but not limited to) direct, incidental, and consequential damages, such as lost revenue, lost profits, loss of customers, and loss of good will. MCIm reserves all rights to seek any and all available legal and equitable remedies against BellSouth.

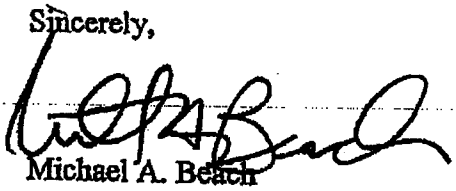
In addition, MCIm hereby demands adequate assurance from BellSouth that BellSouth will perform in accordance with the interconnection agreements. Because of the urgent nature of this

matter, given BellSouth's notice of threatened breach to begin March 11, please provide such adequate assurance by February 25, 2005.

Due to the short time available, MCIm may file, before you reply to this letter, pleadings to commence legal actions, including regulatory proceedings, seeking emergency relief from BellSouth's anticipatory breach. However, MCIm remains highly interested in resolving this matter without court or regulatory intervention, and any such filings should not be viewed as a lack of interest in amicably resolving this matter.

Please contact me if you have any questions or would like to discuss this matter with me.

Sincerely,



Michael A. Beach

EXHIBIT F

Peter H. Reynolds
Director
National Carrier Contracts and Initiatives
22001 Loudoun County Pkwy
Ashburn, VA 20147
(703) 886-1918

February 23, 2005

Re: Change of Law Process

Dear ILEC Negotiator:

As you know, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (the "Act") requires the FCC to establish rules regarding the availability and pricing of unbundled network elements ("UNEs"). These rules are then implemented individually between carriers through interconnection agreements ("ICAs") that are reached via a process of negotiation and arbitration before state commissions. Separate and distinct from FCC or State rules or regulations, ICAs are an independent source of rights and obligations—they are contracts, legally enforceable against the parties to them.

ICAs serve an important function in providing stability to carrier relationships in a contentious regulatory environment where the rules have been constantly subject to challenge. Where there has been an effective change in applicable law, MCI's ICAs contain provisions that address how the parties will implement those changes in their business relationship, via a change-of-law amendment to the ICAs. The Triennial Review Remand Order ("TRRO") constitutes the latest change-in-law event affecting some of MCI's rights and obligations under the ICAs. The TRRO, however, is not self-effectuating—the FCC expressly mandated that the TRRO be implemented through the change-of-law provisions in the parties' approved ICAs. The purpose of this letter is to emphasize that the changes created by the TRRO, along with many of the changes created by the FCC's Triennial Review Order ("TRO"), must now be implemented into our ICAs via these change-of-law provisions.

The change-of-law provisions may vary by contract, but in general they are designed to prevent unilateral or precipitous action by one or the other party. These provisions were negotiated and arbitrated at a point in time at which neither party knew whether application of them would work to its benefit or detriment, and these provisions reflect the State-approved mechanism for transforming contractual rights and responsibilities regardless of the nature of the subsequent change-of-law event.

The change-of-law provisions create processes that are designed to provide a smooth, prompt method for incorporating rule changes into the ICAs. Neither the TRRO nor the TRO preempted any of the change-of-law provisions set forth in our ICAs. In fact, the FCC refused to act on specific requests for such preemption.

To that end, MCI recommends the following general approach for implementing the TRRO and TRO:

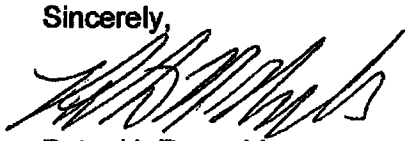
1) **Negotiate.** The ICAs are complex, operational agreements, customized to the unique business requirements of each CLEC-ILEC relationship. The rule changes of the TRRO and TRO represent more thana simple exercise of "cutting and pasting." The change-of-law provisions typically require a period of negotiation so that the parties can minimize and refine, if not eliminate, disputed issues in the context of their specific business relationship. Parties should attempt to resolve as many issues as possible.

2) **Where parties cannot resolve all of the issues, they can seek dispute resolution.** If after negotiations issues remain open, the parties can turn to the dispute resolution processes of our ICAs to resolve any remaining disputes. State commissions can and should do what is necessary to streamline the dispute resolution process by consolidating similar issues into generic proceedings and establishing expedited schedules.

3) **Until changes to ICAs are effectuated, the existing terms of the ICAs remain in effect.** Amending the ICAs need not be a lengthy process. Because the ICAs define how MCI provides services to its customers, however, avoiding both unilateral implementation of the FCC's orders and ILEC selfhelp is critical to MCI's business continuity and to avoid service disruptions. MCI will seek to implement changes of law expeditiously and smoothly. If necessary, however, it will pursue any available legal or equitable remedies in order to rightfully protect its interests.

If you have any questions, please feel free to contact me.

Sincerely,



Peter H. Reynolds

EXHIBIT G

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085051

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

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

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

Please refer to the revised letter for details.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

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

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

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

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

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

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-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, **HDSL** 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 (3-6 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

[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶¶ 198

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,

ORIGNAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT H

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the 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." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, 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. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.

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 7486

February 22, 2005

VIA HAND DELIVERY

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

Re *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00061

Dear Chairman Miller

Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth Communications Corp and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the attached Petition for Approval of the Amendments to the Interconnection Agreement dated May 18, 2001. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds Quickserve to the Agreement

Thank you for your attention to this matter.

Sincerely yours,

Guy M. Hicks

cc: Bo Russell, NewSouth Communications, Corp.
John Heitmann, NewSouth Communications, Corp
Mary Campbell, NewSouth Communications, Corp.
John Fury, NewSouth Communications, Corp

#420636

Exhibit P

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NEWSOUTH COMMUNICATIONS CORP. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NewSouth Communications Corp. ("NewSouth") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated May 18, 2001 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NewSouth and BellSouth state the following:

1. NewSouth and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NewSouth. The Interconnection Agreement was filed with the Tennessee Regulatory Authority ("TRA") on August 1, 2001 for approval.

2. The parties have recently negotiated two Amendments to the Agreement. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds QuickServe to the Agreement. Copies of the Amendments are attached hereto and incorporated herein by reference.

3. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth and BellSouth are submitting their Amendments to the TRA for its consideration and approval.

The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

4. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NewSouth within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

5. NewSouth and BellSouth aver that the Amendments are consistent with the standards for approval.

6. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NewSouth and BellSouth respectfully request that the TRA approve the Amendments negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail on the 23rd day of Feb., 2005:

Mr. Bo Russell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr. John Hitmann
NewSouth Communications, Corp.
1200 19th Street, NEW
Suite 500
Washington, DC 20036

Ms. Mary Campbell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr John Fury
NewSouth Communications Corp.
2 N. Main St.
Greenville, SC 29601

Guy M. Hicks

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment ("Effective Date")

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 To replace the Notices contacts for NuVox Communications, Inc with the following

Mr Bo Russell
2 N Main St
Greenville, SC 29601
brussell@nuvox com

Mr John Heitmann
1200 19th Street, NW
Suite 500
Washington, DC 20036
JHeitmann@KelleyDrye com

Copy to
Ms Mary Campbell
2 N Main St
Greenville, SC 29601
MCampbell@nuvox com

Mr John Fury
2 N Main St
Greenville, SC 29601
JFury @ nuvox com

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.

By _____

Name Kristen Rowe

Title. Director

Date 1/21/05

NewSouth Communications, Corp.

By _____

Name: Jake K. Jennings

Title VP, Regulatory Affairs

Date 01-18-05

[CCCS Amendment 2 of 2]

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective February 10, 2005.

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

WHEREAS, both Parties agree that an initial New Installation of a 2-Wire Port/Loop Combination- Residence line provisioned at a Location where QuickServe is available on the line shall incur a QuickServe Non-Recurring Charge (NRC) at the NRC Currently Combined Conversion Rate set forth in the Agreement and that any initial New Installation of a 2-Wire Port/Loop Combination - Residence line provisioned at a location where QuickServe is not available, shall incur the Not Currently Combined NRC, First and Additional rates set forth in the Agreement,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1 The Parties agree to incorporate into Attachment 2 of the Agreement the rates and USOCs as set forth in Exhibit 1 of this Amendment attached hereto and incorporated herein by this reference

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either of both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.

By _____

Name Kristen Rowe

Title Director

Date 1/13/05

NewSouth Communications, Corp.

By _____

Name Jake E. Jennings

Title VP, Regulatory Affairs

Date. 1/14/05

[CCCS Amendment 2 of 20]

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

February 22, 2005

VIA HAND DELIVERY

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

Re. *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NuVox Communications, Inc f/k/a Trivergent Communications, Inc Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00060

Dear Chairman Miller

NuVox Communications, Inc. f/k/a Trivergent Communications, Inc and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the executed Amendments to the Interconnection Agreement dated June 30, 2000 The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region The Interconnection Agreement will continue month to month until the arbitrations have been completed

The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement

Thank you for your attention to this matter

Sincerely yours,

Guy M. Hicks

GMH/dt

Enclosure

cc: Hamilton E. Russell, III, Trivergent Communications, Inc
John J. Heitmann, Esquire, Attorney for Trivergent Communications, Inc
Don Baltimore, Esquire, Attorney for Trivergent Communications, Inc

#538118

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NUVOX COMMUNICATIONS, INC. F/K/A TRIVERGENT COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. ("NuVox") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated June 30, 2000 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NuVox and BellSouth state the following:

1. NuVox and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NuVox. The Interconnection Agreement was approved by the Tennessee Regulatory Authority ("TRA") on October 24, 2000.

2. The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region. The Interconnection Agreement will continue month to month until the arbitrations have been completed.

3. The parties have recently negotiated two Amendments to the Agreement. The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement.

4. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NuVox and BellSouth are submitting their Amendments to the TRA for its consideration and approval. The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

5. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NuVox within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

6. NuVox and BellSouth aver that the Amendments are consistent with the standards for approval.

7. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NuVox and BellSouth respectfully request that the TRA approve the Amendment negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC

By _____
Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail, on the 23rd day of Feb., 2005:

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc. (formerly TriVergent)
301 North Main Street, Suite 500
Greenville, SC 29601

John J. Heitmann Esquire
Counsel to NuVox Communications, Inc.
Kelley Drye & Warren LLP
1200 19th Street, NW
Washington, DC 20036

Don Baltimore, Esquire
Farrar & Bates
211 Seventh Avenue North, Suite 420
Nashville, TN 37219-1823

_____
Guy M. Hicks

Amendment to the Agreement
Between
NuVox Communications, Inc. (fka Trivergent Communications, Inc.)
and
BellSouth Telecommunications, Inc.
Dated June 30, 2000

Pursuant to this Amendment, (the "Amendment"), NuVox Communications, Inc (fka Trivergent Communications, Inc) (NuVox), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated June 30, 2000 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment

WHEREAS, BellSouth and NuVox entered into the Agreement on June 30, 2000, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 The Parties agree to replace the rates in Exhibit A of Attachment 3, with the rates set forth in Exhibit 1 of this Amendment, attached hereto and incorporated herein by this reference.

2 All of the other provisions of the Agreement, dated June 30, 2000, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc.

By: Kristen E. Lowe

Name: KRISTEN E. LOWE

Title. DIRECTOR

Date: 1/12/05

NuVox Communications, Inc. (fka Trivergent Communications, Inc.)

By: Hamilton E. Russell

Name: Hamilton E. Russell

Title. VP, Legal Affairs

Date: 01-07-05

[CCCS Amendment 2 of 11]