

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 10, 2006

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH
COMMUNICATIONS CORP, NUVOX COMMUNICATIONS,
INC. KMC TELECOM V, INC., KMC TELECOM III LLC, AND
XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS
OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO.
SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT
CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION
AGREEMENT WITH BELL SOUTH

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) DOCKET NO.
) 04-00046
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ORDER GRANTING MOTION AND DENYING REQUEST

This matter came before Chairman Ron Jones, Director Deborah Taylor Tate and Director Pat Miller of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the Panel of Arbitrators ("Panel" or "Arbitration Panel") assigned to this docket, on May 11, 2005 and on August 8, 2005 for consideration of the *Joint Motion to Move Issues to the Generic Proceeding* and BellSouth Telecommunications Inc.'s ("BellSouth") request to move certain issues to the Generic Docket proceeding.¹

Background

On February 11, 2004, NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius

¹ On October 29, 2004, BellSouth filed a petition requesting that the Authority institute a generic proceeding to determine the impact of recent Federal Communications Commission ("FCC") and United States District Court decisions on interconnection agreements between BellSouth and competitive local exchange carriers ("CLECs"). *See In re: BellSouth's Petition To Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381, *Petition to Establish Generic Docket* (October 29, 2004) ("Generic Docket" or "Generic Proceeding").

Management Co. of Chattanooga, LLC ("Joint Petitioners") filed a *Joint Petition for Arbitration* ("*Joint Petition*") requesting arbitration of an Interconnection Agreement with BellSouth pursuant to Section 252(b) of the Telecommunications Act of 1934, as amended.²

The Panel conducted the hearing in this matter on January 25-27, 2005, and post-hearing briefs were due from the Parties on April 15, 2005. On April 15, 2005, the Joint Petitioners and BellSouth (together the "Parties") filed the *Joint Motion to Move Issues to the Generic Proceeding* requesting that certain arbitration issues be moved to the Generic Proceeding and that certain issues be declared moot. The Parties asserted that issues related to the *Triennial Review Remand Order* ("*TRRO*")³ will be considered in the Generic Proceeding, and that one of the issues proposed for the Generic Proceeding is "substantially similar" to Arbitration Item 23 ("Item 23")⁴ in the Parties' arbitration.⁵ The Parties requested that, to the extent that they do not negotiate otherwise, Item 23 be moved to the Generic Docket for consideration and the resolution of Item 23 be folded back into the arbitration so that it could be properly incorporated into the resulting agreements.

In the *BellSouth Telecommunications, Inc. Post-Hearing Brief* ("*Post-Hearing Brief*") filed on April 15, 2005, BellSouth requested that Arbitration Items 26, 36, 37, 38, and 51⁶ be moved to the Generic Proceeding because similar, if not identical, issues were being raised in that proceeding.⁷

² At a regularly scheduled Authority Conference held on July 11, 2005, the Panel granted the *Motion of KMC Telecom V, Inc. and KMC Telecom III, LLC to Withdraw with Prejudice* from this docket.

³ *In the Matter of: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd. 2533 (2005) (February 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

⁴ Item 23: What rates, terms and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?

⁵ See Generic Proceeding, Docket No. 04-00381, *Joint Issues Matrix* (September 9, 2005).

⁶ Item 26: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

Item 36: (A) How should Line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to Line Conditioning?

Item 37: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

Item 38: Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?

Item 51: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?

⁷ *BellSouth's Post-Hearing Brief*, p. 7 (April 15, 2005).

BellSouth contended that it would be a waste of the Authority's and the Parties' time to address these similar issues in the context of a Section 252 arbitration when they are being raised in the Generic Docket. Additionally, BellSouth argued that the Authority should resolve these issues in the Generic Proceeding because the Authority's decision may impact carriers that are not parties to the arbitration. In the alternative, if the Authority does not "move" these issues into the Generic Proceeding, BellSouth requested that the Authority defer consideration of the issues until after the Generic Proceeding is concluded to avoid inconsistent rulings. The Joint Petitioners' Post-Hearing Brief did not mention the possibility of considering these issues outside of the arbitration.

May 11, 2005 Hearing

On May 11, 2005, the Panel heard oral argument on the *Joint Motion to Move Issues to the Generic Proceeding* and BellSouth's Request to move Arbitration Items 26, 36, 37, 38, and 51 to the Generic Proceeding. The Joint Petitioners opposed BellSouth's request to move issues other than Item 23, stating that they had already negotiated, arbitrated, filed testimony and participated in a hearing on those issues, and they have a right to have those issues resolved in the context of the arbitration. Because of the relative importance of Item 26⁸, the Joint Petitioners emphasized that they wanted these issues decided sooner rather than later. The Joint Petitioners agreed that certain issues in the Generic Docket related to the *TRRO* would have to be incorporated into the arbitrated agreement. Nevertheless, they argued that each of the issues identified by BellSouth were issues related to the *Triennial Review Order* ("TRO").⁹ Asserting that they had a common understanding with BellSouth, the Joint Petitioners maintained that they did not intend to fully participate in *TRO*-

⁸ Item 26: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

⁹ *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, aff'd 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) (August 21, 2003) ("*Triennial Review Order*" or "*TRO*").

related issues in the Generic Proceeding because those issues were being addressed in this arbitration docket.

BellSouth contended that for the last three years the Parties had been negotiating at least five issues that are common, if not identical, to the issues that will be addressed in the Generic Proceeding. BellSouth argued that it is negotiating with all Tennessee competitive local exchange carriers ("CLECs") on the issues of commingling and enhanced extended loop ("EEL") audits. BellSouth asserted that the Authority could issue conflicting decisions on the same issues because different panels are considering the arbitration and the Generic Proceeding.

The Joint Petitioners maintained that Arbitration Items 36, 37 and 38 address line conditioning, which has not been identified as one of the issues to be considered in the Generic Proceeding. Furthermore, the Joint Petitioners contended that they have a right under Section 252 of the Federal Telecommunications Act¹⁰ to have the Authority decide their issues within the context of the arbitration and expressed concern that BellSouth will have the benefit of "no new adds" under the *TRRO*, while the Joint Petitioners continue to do without the benefits available to them under the *TRO*. In addition, the Joint Petitioners pointed out that the Florida Public Service Commission ("Florida PSC") denied BellSouth's motion to move issues from the arbitration to a similar Florida generic docket.

BellSouth asked for the Authority's guidance regarding whether it is obligated to commingle Section 271 elements with Section 251 elements and maintained that the commingling issue will be common to both the arbitration and the Generic Proceeding. BellSouth agreed that the Florida PSC had denied its request but argued that the Florida PSC had not given any reasons for its denial and had not responded to BellSouth's alternative request that the decisions be made concurrently to avoid inconsistent rulings, therefore, that option may still be available in Florida.

¹⁰ 47 U.S.C. § 252 (2000).

After hearing the oral argument of the Parties, the Panel voted unanimously to grant the *Joint Motion to Move Issues to the Generic Proceeding*. The Panel also voted unanimously that the Joint Petitioners must respond by May 20, 2005 to BellSouth's request to move Arbitration Items 26, 36, 37, 38 and 51 to the Generic Docket, and that the request would be deliberated by the Arbitration Panel at a later date.

Joint Petitioners' Opposition

On May 20, 2005, the Joint Petitioners filed *Joint Petitioners' Opposition to BellSouth's Request to Remove Certain Issues from Joint Petitioners' Section 252 Arbitration Proceeding ("Joint Petitioners' Opposition")*.¹¹ The Joint Petitioners further argue that those issues are based on the *TRO*, which has been in force since October 2003.¹² In contrast, Item 23, which they joined with BellSouth in a motion to move to the Generic Docket, is impacted by the *TRRO*.¹³ The Joint Petitioners argue further that 47 U.S.C. § 252(b)(1) provides the Joint Petitioners the right to "petition a State commission to arbitrate any open issues."¹⁴ Although BellSouth argues that it would be a waste of time to address these issues in the arbitration, the Joint Petitioners contend that the time and resources have already been expended in developing these issues in the arbitration docket through testimony and hearing and urge the Authority to resolve the issues in this docket without delay.¹⁵ The Joint Petitioners maintain that the Authority has previously rejected BellSouth's attempt to remove issues from the ITC^DeltaCom arbitration¹⁶ and the ICG Group

¹¹ On May 25, 2005, the Joint Petitioners filed a corrected version with the Authority which corrected footnotes 1 and 11.

¹² See *Joint Petitioners' Opposition*, p. 2 (May 20, 2005).

¹³ *Id.*

¹⁴ *Id.* (quoting 47 U.S.C. § 252 (b)(1) (2000)).

¹⁵ *Id.* at 3.

¹⁶ See *In re: Petition for Arbitration of ITC^Deltacom Communications, Inc. with BellSouth Telecommunications, Inc.*, Docket No. 03-00119 (August 20, 2003).

arbitration¹⁷ to other forums.¹⁸ In addition, the Joint Petitioners point out that the Florida PSC recently rejected BellSouth's motion to move issues from the parties' current arbitration in Florida.¹⁹

According to the Joint Petitioners, there are no issues in the Generic Proceeding that correspond to the Line Conditioning issues in the arbitration (Items 36, 37 and 38). While broad issues that correspond to Arbitration Item 26 (commingling) and Item 51 (EEL audits) have been identified in the preliminary issues list for the Generic Proceeding, the Joint Petitioners argue that it is not clear that the language to be reviewed for those issues will mirror the language they propose.²⁰ Because they are facilities-based carriers, the Joint Petitioners claim that commingling and EEL-related issues are critical to their ability to compete effectively. Although BellSouth urges the Authority to hold certain arbitration issues in abeyance to avoid the risk of conflicting results, the Joint Petitioners assert that this argument is relevant only to Arbitration Items 26 and 51, and that there is little risk of conflicting results, because two of the three directors are on both panels.²¹ Furthermore, if the Arbitration Panel reached different results than the panel in the Generic Proceeding, the Authority would simply need to set forth a sufficient legal and/or factual basis for the varying results.²² The Joint Petitioners do not agree with BellSouth's concern that the decisions in this arbitration could impact other carriers, pointing out that decisions in arbitrations almost always have the potential to impact other carriers.

Finally, the Joint Petitioners dispute BellSouth's contention that they would not be prejudiced by transferring or delaying the resolution of these issues. Because the law impacting Arbitration Items 26, 36, 37, 38 and 51 has been clear since October 2003 and because the resolution

¹⁷ See *In re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00377, *Final Arbitration Order*, p. 9 (August 4, 2000).

¹⁸ See *Joint Petitioners' Opposition*, p. 5 (May 20, 2005).

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 4-5.

²² *Id.* at 5.

of those issues is critical for them, the Joint Petitioners urge the Authority to decide these issues in light of the full record developed in this proceeding.²³

BellSouth's Reply

On June 7, 2005, BellSouth filed *BellSouth Telecommunications Inc. Reply to Joint Petitioners' Opposition* ("BellSouth's Reply"). BellSouth argued that its request does not impinge on the Joint Petitioners' Section 252 rights because by filing the petition for arbitration, participating in the hearing and by filing post-hearing briefs, the Joint Petitioners have fully availed themselves of their Section 252 right to "petition a State commission to arbitrate any open issue."²⁴ BellSouth contends that it is disingenuous for the Joint Petitioners to argue that Section 252(b)(1) prohibits moving common issues to the Generic Docket when they joined with BellSouth to move Item 23 to the Generic Docket.²⁵ BellSouth further asserts that the Authority has the discretion to move issues pursuant to TRA Rule 1220-1-2-.22(2)²⁶, and that the Authority has a long history of resolving Section 252 disputes via generic proceedings, such as the Generic UNE docket²⁷, the Generic Line Sharing docket²⁸ and the Performance Measures docket.²⁹ BellSouth emphasizes that it is not asking the Authority to decide these issues outside of the arbitration; rather, it is requesting that the Authority consider them in conjunction with its consideration of the same or similar issues in the

²³ *Id.* at 6-7.

²⁴ See *BellSouth's Reply*, p. 3 (June 7, 2005) (quoting 47 U.S.C. § 252(b)(1) (2000)).

²⁵ *Id.*

²⁶ TRA Rule 1220-1-2-.22(2) states:

In any contested case the Authority or the Hearing Officer:

(2) may, on its own motion or the motion of any party, allow amendments, consolidate cases, join parties, sever aspects of the case for separate hearings, permit additional claims or contentions to be asserted, bifurcate or otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority;

²⁷ See *In re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, Docket No. 97-01262 (June 23, 1997).

²⁸ See *In re: Generic Docket to Establish UNE Prices for Lines Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA*, Docket 98-00123, Docket No. 00-00544 (May 9, 2000).

²⁹ *In re: Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, Docket No. 01-00362 (February 21, 2001).

Generic Proceeding.³⁰ While the Florida PSC denied BellSouth's similar request, BellSouth points out that the South Carolina, North Carolina and Georgia commissions ruled in its favor.³¹

BellSouth contends that none of the precedents cited by the Joint Petitioners undermine BellSouth's arguments in favor of moving the issues. BellSouth maintains that all of the *TRO* arbitration issues are being addressed in the Generic Proceeding and denies the Joint Petitioners' claim that some of these issues will not be addressed in the Generic Proceeding. BellSouth argues that the Joint Petitioners' May 20, 2005 filing conceded that Arbitration Items 26 and 51 are being addressed in the Generic Proceeding.³² BellSouth reiterates its contention that Arbitration Items 36-38 are encompassed within Issue 26 of the Generic Proceeding regarding routine network modifications, because ¶ 643 of the *TRO* states that line conditioning can be "properly seen as a routine network modification."³³ BellSouth maintains that a decision in the arbitration will establish a precedent that will affect all carriers, and therefore, the issues should be considered within the Generic Proceeding, where all affected entities will have the opportunity to be heard.

BellSouth contends that the Joint Petitioners will not be prejudiced by its request because (1) the Parties jointly waived the statutory nine-month deadline; (2) the Joint Petitioners agreed to implement the *TRO* rulings in the new, arbitrated agreement; (3) the Joint Petitioners' current agreement has not been amended to reflect the *TRO*, even for those rights not impacted by subsequent court or FCC decisions; (4) the Generic Proceeding hearing will take place on September 12-15, 2005; and (5) BellSouth has sought via its Summary Judgment Motion to resolve most of the *TRO* arbitration issues prior to the hearing.³⁴ BellSouth argues that the Joint Petitioners did not object to moving the *TRRO* issues to the Generic Proceeding, because they are primarily beneficial to BellSouth. BellSouth thus concludes that the Joint Petitioners want to obtain the benefits of the

³⁰ See *BellSouth's Reply*, p. 5 (June 7, 2005).

³¹ *Id.* at 6.

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.* at 10.

TRO prior to implementing the less-beneficial components of the *TRRO* at the expense of all CLECs.³⁵

Joint Petitioners' Rebuttal

On July 18, 2005, the Joint Petitioners submitted their *Joint Petitioners' Rebuttal to BellSouth's Reply Regarding Removing Certain Issues From the Joint Petitioners' Section 252 Arbitration Proceeding* ("Joint Petitioners' Rebuttal") in which they argue that BellSouth's request to move Arbitration Items 26, 36, 37, 38 and 51 to the Generic Proceeding is an attempt to further delay compliance with the provisions of the *TRO* that are critical to facilities-based competitors and to raise the costs of the Joint Petitioners by requiring them to litigate issues twice.³⁶ The Joint Petitioners argue that the *TRO*-related issues have been briefed and are ready for a decision by the Authority, and that there is no reason for the Joint Petitioners to await relief or to present their case a second time in another docket, in contrast to Item 23, which is potentially impacted by the *TRRO*.³⁷ The Joint Petitioners dispute BellSouth's assertion that the Authority's previous actions in establishing generic dockets such as performance measurement, line sharing and UNE ratemaking should be precedential because those proceedings involved BellSouth's Section 251 obligations and were not Section 252 arbitrations.³⁸ The Joint Petitioners maintain that they would be prejudiced by transferring these issues to the Generic Proceeding or delaying their resolution, and they state that BellSouth should not be able to delay compliance with the *TRO* mandates, which include Arbitration Item 26 (commingling) and Item 51 (EELs).³⁹

August 8, 2005 Authority Conference

At a regularly scheduled Authority Conference held August 8, 2005, the Panel voted unanimously to deny BellSouth's request to move Arbitration Items 26, 36, 37, 38 and 51 to the

³⁵ *Id.* at 11.

³⁶ *See Joint Petitioners' Rebuttal*, pp. 1-2 (July 18, 2005).

³⁷ *Id.* at 2.

³⁸ *Id.* at 4.

³⁹ *Id.* at 8.

Generic Docket. The Arbitration Panel rejected BellSouth's arguments that the issues should be moved to avoid inconsistent decisions and to avoid prejudice to other CLECs. The Panel reasoned instead that the possibility of inconsistent decisions is inherent in the structure of the Authority, and the concomitant issues associated with the structure should not delay the decision-making process.

The Panel found that pursuant to Section 252, the Joint Petitioners have a right to petition for arbitration of any open issue. The Joint Petitioners have petitioned the Authority for arbitration, and the Authority accepted the arbitration. In addition, the Arbitration Panel found that the Telecommunications Act⁴⁰ directs the state commission to resolve each issue set forth in the petition and the response. Therefore, the Joint Petitioners are entitled to have the issues decided within the context of the arbitration.

In addition, a majority of the Arbitration Panel⁴¹ found that it is unclear whether the arbitration issues BellSouth is requesting to be moved are identical to the issues in the Generic Docket. Instead of granting BellSouth's alternative request to defer Items 26, 36, 37, 38 and 51 until the conclusion of the Generic Docket, a majority of the Arbitration Panel found that it would be beneficial to hear testimony of the witnesses in the Generic Docket and voted to hold deliberations on Arbitration Items 26, 36, 37, 38 and 51 in abeyance until the conclusion of the hearing in the Generic Docket, which was scheduled to begin September 13, 2005.⁴²

IT IS THEREFORE ORDERED THAT:

1. The *Joint Motion to Move Issues to the Generic Proceeding* is granted, Arbitration Item 23 shall be considered and decided in the Generic Proceeding in TRA Docket No. 04-00381 and the resolution of Arbitration Item 23 shall be folded back into this arbitration to be properly incorporated into the resulting agreements.

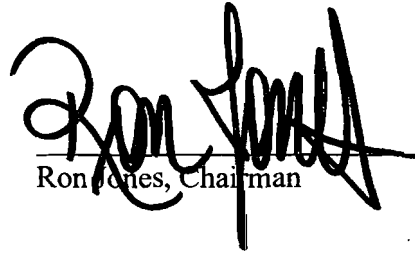
⁴⁰ 47 U.S.C. § 151 *et seq.* (2000).

⁴¹ Chairman Jones opposed deferring the proceedings because the docket is ripe for a decision, and he did not recognize any benefit derived from the delay. Chairman Jones also noted that holding the decision in abeyance may cause an unwarranted deleterious effect in subsequent negotiations between BellSouth and the Joint Petitioners.


⁴² See *Generic Docket*, Docket 04-00381, *Re-notice of Hearing* (September 8, 2005).

2. BellSouth's request to move Arbitration Items 26, 36, 37, 38, and 51 to the Generic Proceeding is denied.

3. Deliberation on Arbitration Items 26, 36, 37, 38, and 51 in this docket are held in abeyance until the conclusion of the hearing in the Generic Proceeding in TRA Docket No. 04-00381, scheduled to begin September 13, 2005.⁴³



Ron Jones, Chairman

Deborah Taylor Tate, Director⁴⁴


Pat Miller, Director

⁴³ Further action in this docket and the issuance of this order were held in abeyance pending resolution of certain federal court and state court actions filed by NuVox Communications, Inc. and Xspedius Communications, Inc. which were dismissed on November 10, 2005 and March 7, 2006 respectively.

⁴⁴ Director Tate voted in agreement with the other directors but resigned her position as director before the issuance of this order.