BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

June 3, 2004

IN RE: PETITION FOR DECLARATORY RULING REQUIRING BELLSOUTH TELECOMMUNICATIONS, INC. TO HONOR EXISTING INTERCONNECTION AGREEMENTS	))))	Docket No. 04-00158

PETITION TO INTERVENE OF THE COMPETITIVE CARRIERS OF THE SOUTH, INC. MEMORANDUM IN SUPPORT OF THE PETITION OF XO OF TENNESSEE, INC. FOR A DECLARATORY RULING

The Competitive Carriers of the South, Inc. ("CompSouth")[1] petitions the Tennessee Regulatory Authority ("TRA") to grant CompSouth leave to intervene in the above-captioned proceeding and further submits the following memorandum in support of the Petition of XO Tennessee, Inc. for a declaratory ruling regarding the unbundling obligations of BellSouth Telecommunications, Inc. ("BellSouth").

PETITION TO INTERVENE

CompSouth petitions the TRA to intervene in the above-captioned proceeding pursuant to T.C.A. § 4-5-310(a).

CompSouth is composed of member companies that are competitive local exchange carriers certified by the TRA Thus, as more fully explained in the following

[1] The members of CompSouth participating in this filing are Access Integrated Networks, Inc , Access Point Inc , MCI, Birch Telecom, Covad Communications Company, AT&T, Talk America, Nuvox Communications, Inc , ITC^DeltaCom, Xspedius Communications, Momentum Telecom, Inc , Network Telephone Corp , KMC Telecom, LecStar Telecom, Inc , Z-Tel Communications, Inc , and IDS Telcom LLC

memorandum, CompSouth's members' legal rights, duties, privileges, immunities, or other legal interests or responsibilities may be affected or determined by the outcome of this proceeding, the purpose of which is to address BellSouth's interconnection obligations. Furthermore, granting this petition will not impair the interests of justice or the orderly and prompt conduct of these proceedings. CompSouth, therefore, asks that the Authority grant this Petition to Intervene.

MEMORANDUM IN SUPPORT OF THE PETITION OF XO FOR A DECLARATORY ORDER

I INTRODUCTION

The actions and statements of BellSouth since the date of D.C. Circuit Court of Appeals decision vacating portions of the FCC's Triennial Review Order, United States Telecom Association v FCC, 359 F.3d 554 (D.C Cir. 2004) ("USTA II") have created confusion and uncertainty among CompSouth members and within the CLEC community[2] as to whether BellSouth intends to honor its binding contractual obligations. As a result of this uncertainty, Tennessee consumers are being harmed today because BellSouth's actions make it difficult for competitive providers in Tennessee to develop and implement business plans to offer competitive services and pricing and to expand their marketing efforts for existing competitive services to Tennessee consumers Furthermore,

[2] CompSouth is authorized to represent that these additional companies and national trade associations are in full support of this filing· The Association for Local Telecommunications Services, the leading trade association representing facilities-based local telecommunications carriers, comprised of 33 CLEC members operating throughout the U S including in every state in the BellSouth region, CompTel/Ascent Alliance, a national trade association representing facilities-based carriers, providers using unbundled network elements, global integrated communications companies and their supplier partners
CompTel/Ascent's membership includes companies of all sizes and profiles that provide voice, data and video services in the U S and around the world, the PACE Coalition, with 16 member companies who use unbundled network elements throughout the country, DSLnet Communications, LLC, and BroadRiver Communication Corporation

CompSouth and its members are concerned that BellSouth may erroneously attempt to rely on *USTA II* as a basis for unilaterally undermining or impeding CLECs' access to UNEs, which in turn could cause considerable disruption in the local market in Tennessee, especially for mass market customers. This may happen directly, *e g* , if BellSouth attempts to deny access to UNEs and/or UNE-based services outright, or indirectly, if BellSouth attempts to impose a system of rates, charges and administrative costs that make it impossible for CLECs to continue to provide services in the local market at competitive prices.

The stay of the D C. Circuit Court of Appeals decision may be lifted on June 15, 2004 and the competitive providers in Tennessee must have some certainty that the underpinnings for the rates, terms and conditions of their service delivery platforms – the binding interconnection agreements to which they and BellSouth have agreed and/or arbitrated and were approved by this Authority – will remain effective As a result, CompSouth supports the Petition of XO asking the Authority to issue an order requiring BellSouth to maintain the status quo unless and until the Authority approves any modifications to the interconnection agreements between BellSouth and the CompSouth members

II. STATEMENT OF FACTS

A. BellSouth's Contradictory Actions and Statements Have Created Uncertainty within the CLEC Community That Harms Tennessee Consumers.

USTA II vacated and remanded certain portions of the FCC's Triennial Review Order ("TRO") regarding the FCC's nationwide finding of impairment for mass-market switching and certain dedicated transport elements In that decision, the Court stayed the

effective date of its Order until the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from the date of the Court's decision, March 2, 2004. As a result of *USTA II*, this Authority suspended its procedural schedule in those dockets which had been initiated to implement the TRO as directed by the FCC. On April 1, 2004, the D C. Circuit Court granted the FCC's unopposed motion to extend the stay for an additional 45 days to permit carriers to engage in commercial negotiations, until June 15, 2004 The FCC and the CLEC coalition have since asked the Court to stay the issuance of the mandate until the U.S Supreme Court decides whether to review the USTA II decision. Those requests are pending.

BellSouth's Contradictory Actions and Statements since *USTA II*

- At a hearing before the North Carolina Utilities Commission ("NCUC") on March 23, 2004, BellSouth and CompSouth were requested by the NCUC to appear and discuss the effects of the *USTA II* decision on existing interconnection agreements. At that hearing, BellSouth was asked to state its position on the effect of the D C. Circuit Court's decision in *USTA II* on existing interconnection agreements Counsel for BellSouth responded that there "is a school of thought that says these contracts are not enforceable because they were entered into under a mistake of law or mistake of fact." However, BellSouth's counsel indicated that BellSouth had not yet decided whether it would take this position. BellSouth's counsel went on to say that "assuming the change of law provision [in the interconnection agreements] applies" there would be a notice period of 30-45 days and a subsequent 90-day negotiation period following which either party could petition the Commission for resolution of any dispute regarding such things as

"whether the law has changed, what the change if law is and what the contract ought to say."

- On that same day, March 23, 2004, BellSouth released its Carrier Notification SN91084043 letter (attached as Exhibit 1) to all CLECs regarding its proposed "Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Service". In that Carrier Notification letter, BellSouth stated 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 (UNE-P) at TELRIC rates." (emphasis added) BellSouth's Carrier Notification letter further noted that the Court's Order eliminating its obligation to provide UNE-P will become effective on May 1, 2004. On April 26, 2004, BellSouth released a second Carrier Notification letter SN91084073 (attached as Exhibit 2) reminding CLECs that its proposed "Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Service" offer is only available until May 1, 2004, notwithstanding the fact that an additional 45 day stay had been granted by the D.C. Circuit Court of Appeals on April 1, 2004.
- On April 22, 2004, BellSouth released Carrier Notification SN91084063 letter (attached as Exhibit 3) to all CLECs regarding its proposed "Commercial Offering for BellSouth Unbundled Network Element (UNE) Transport Transition." In that Carrier Notification letter, BellSouth stated that "[u]pon the DC Circuit Courts's effective vacatur of the FCC's Triennial Review Order, BellSouth's obligation to provide dedicated transport and high capacity loops as an unbundled network

element pursuant to Section 251 of the Telecommunications Act will be eliminated. As such, and due to regulatory uncertainty, BellSouth is preparing to offer its dedicated transport and high capacity loops solely via its access tariffs." (emphasis added)[3]

- On May 11, 2004, BellSouth was again asked to state whether it intended to honor the contractual obligations contained in existing interconnection agreements after June 15, 2004. At a status conference conducted by the Florida Public Service Commission, BellSouth stated that it was "considering all options" and refused to state whether it would honor existing interconnection agreements after June 15, 2004; refused to state whether it would consider such contracts to be void; would not rule out unilateral action to repudiate the interconnection agreements and "couldn't say" whether it would follow any change of law provisions of existing interconnection agreements BellSouth further stated that it might permit existing arrangements to continue after June 15, 2004 but may elect to bill the CLEC rates that it considered appropriate rather than the rates in the existing interconnection agreements.
- On May 24, 2004, BellSouth filed a response with the North Carolina Utilities Commission to CompSouth's May 17, 2004 letter Request that a status conference be scheduled to address the issue of whether BellSouth intended to abide by its contractual obligations post June 15th CompSouth's Request recited the actions and statements of BellSouth (as stated above) in sending out Carrier Notification

[3] This BellSouth statement is particularly egregious, because the *USTA II* decision does not vacate the national finding by the FCC that CLECs are impaired without access to high capacity loops

letters stating that its obligations to provide certain UNEs would be "eliminated" upon *USTA II* becoming effective as the basis for that request. In its May 24th response (Attached as Exhibit 4) BellSouth stated that "in the event that any of CompSouth's member companies are laboring under a genuine misunderstanding[4] about the meaning of BellSouth's Carrier Notification Letter, BellSouth has posted another Carrier Notification letter to clarify its position."

- In its May 24, 2004 Carrier Notification SN91084106 letter, (Attached as Exhibit 5 and referenced in BellSouth's Response to the North Carolina Utilities Commission) BellSouth states that the letter is to "affirm that BellSouth will not unilaterally breach its interconnection agreements". BellSouth goes on to state that upon vacatur, it will pursue "modification, reformation or amendment of existing Interconnection Agreements" and "contrary to rumors... BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under CLEC's Interconnection Agreement."
- On May 26, 2004, BellSouth and CompSouth participated in a Status Conference call convened by the North Carolina Utilities Commission. On that Conference call, counsel for CompSouth indicated that while the BellSouth May 24, 2004

[4] It is apparent that CompSouth members' "genuine misunderstanding" about BellSouth's intent was also shared by the FCC In the FCC's Motion to the DC Circuit Court of Appeals for a stay of the mandate in *USTA II,* filed on May 24, 2004, the FCC stated, "During the periods following vacatur and remand of the Commission's impairment and unbundling rules [in the past], the Bell operating companies agreed to abide by the vacated unbundling rules pending the adoption of permanent rules But none of the ILECs have made such voluntary commitments in this case " Citing the BellSouth April 22, 2004 Carrier Notification letter, the FCC stated, "To the contrary, many of the largest ILECs have indicated that they will immediately stop providing certain network elements at TELRIC rates, notwithstanding the terms of existing interconnection agreements " *See United States Telecom Ass'n v FCC,* D C Cir No 00-1012, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari, dated May 24, 2004, at 11 Attached as Exhibit 6

Carrier Notification letter cleared up some matters, CompSouth members were concerned about what was "not" stated in that letter regarding BellSouth's intentions concerning the rates to be charged for UNEs and whether BellSouth would continue to process new UNE orders. Counsel for BellSouth indicated that there will be no unilateral action taken by BellSouth on June 16, 2004; that BellSouth would continue to accept and process UNE orders and will not unilaterally change rates BellSouth counsel, however, would not agree to modify the Carrier Notification letter to put these further commitments in writing nor would BellSouth commit to pursue interconnection contract amendments through the provisions of those agreements for contract amendments resulting from a "change in law".

- On May 28, 2004, BellSouth filed another letter with the North Carolina Commission (Attached as Exhibit 7) in which BellSouth stated that the company intends to "effectuate changes to its interconnection agreements via established legal procedures," once again failing to make a clear statement that the company will abide by the change-of-law provisions in those agreements. Furthermore, the BellSouth letter stated that the company will "continue to accept and process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those services in accordance with the terms of existing interconnection agreements." The term "services" typically refers to offerings ordered out of the tariff, not UNEs Therefore, it is not clear whether the term "services," as used in that sentence, means that CLECS may continue to purchase

those listed elements as UNEs or will be forced to purchase those elements as "services" at BellSouth's tariffed rates

ARGUMENT

Because BellSouth has refused to provide clear and affirmative written commitments that it will maintain the status quo regarding rates, terms and conditions and honor existing interconnection agreements, including the contractual obligations of those agreements prescribing how they may be amended after June 15, 2004, it is necessary for this Authority to declare that BellSouth has such an obligation.

As BellSouth's North Carolina counsel stated, most, if not all, of its interconnection agreements have very clear provisions prescribing how a party may seek to amend an interconnection agreement to incorporate any alleged change in law. These provisions typically require notice, negotiations and, failing agreement, activation of the dispute resolution provisions of the contract including resolution by the Authority. That is the process by which BellSouth must be required to seek any changes to its interconnection agreements, which, as the FCC recognized, "embody the respective rights and obligations of competitors and incumbents respecting unbundled elements." FCC Motion at 9.

B. USTA II Presents No Unique Circumstances Permitting BellSouth To Unilaterally Invalidate its Interconnection Obligations.

The *USTA II* Order and its vacatur of portions of the TRO present no unique circumstances that would permit BellSouth to unilaterally avoid its obligations under existing interconnection agreements, or to ignore the change of law provisions in those agreements. Indeed, representations made by counsel representing BellSouth and the other BOCs during the oral argument before the DC Circuit Court of Appeals that preceded the

USTA II decision *acknowledged* that BellSouth remains obligated by its interconnection agreements regardless of any court vacatur of the FCC's TRO rules.[5]

The FCC's rules implementing the unbundling and access requirements of the federal Telecommunications Act of 1996 have been the subject of appellate review and agency reconsideration almost continually since 1996. This litigation has covered the FCC rules defining which network elements must be unbundled, the terms and conditions applicable to such unbundling[6] and the rates incumbent carriers may demand for those elements.[7] As a result, interconnection agreements have long contained "change of law" provisions to address any such situations.

One of the central purposes of the "change of law provisions" in the state-approved interconnection agreements is to minimize the chaos and uncertainty created by an unsettled regulatory environment. And critically, the change of law provisions are designed to minimize negative impacts on consumers and competition. Such provisions are often mutually agreed upon by the parties and are intended to address the very situation

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[5] *See USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Transcript of Oral Argument, January 28, 2004, at 7-11 (*e.g.*, when asked by the Court "Where does that [a vacatur] leave your clients, in your view, with respect to the precise matters that are at issue?" the RBOCs' counsel replied "[*W]e are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements*," to which the Court responded, "Right" (emphasis added))

[6] *See* First Report & Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *vacated in part by Iowa Utilities Bd.*, 525 U.S. 366, *decision on remand*, Third Report & Order & Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 16 FCC Rcd 1724 (1999), *vacated in part by United States Telecom. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *on remand to TRO*, 18 FCC Rcd 16,978, vacated in part by USTA II, 359 F.3d 554

[7] *Local Competition Order*, 11 FCC Rcd 15499, *vacated in part by Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed by Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002)

facing the industry today. For example, the change of law provision found in the AT&T-BellSouth interconnection agreement provides that,

> in the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of AT&T or BellSouth to perform any material terms of this Agreement, AT&T or BellSouth may, on ninety (90) 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.

If the change of law provisions of interconnection agreements could be avoided -- a position that BellSouth refuses to disclaim -- it would render these contractual provisions meaningless. The Authority should always favor reading some meaning and effect into all the provisions of approved interconnection agreements.

C The FCC has Directed that Any Changes Required by the TRO be Implemented through Amendments to Interconnection Agreements as Specified in those Agreements.

The FCC required that the contract amendment process – and not unilateral action -- would be used to implement the provisions of the *TRO*. The FCC explicitly rejected requests by BellSouth and other Incumbent Local Exchange Carriers for approval to simultaneously abrogate all existing interconnection agreements to lessen incumbents' unbundling obligations. *See TRO* ¶ 701 ("[T]o the extent our decision in this Order changes carriers' obligations under section 251, we *decline* the request of several [incumbent carriers] that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions") (emphasis added). Instead, the FCC directed that any carriers seeking changes to their interconnection agreements must comply with their change of law provisions, which typically provide for voluntary negotiation followed by state

commission action when the parties disagree. Indeed, the FCC concluded that such "voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252" of the Act. *Id.* Rather than seeking changes "overnight," "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." *Id* ¶ 700.

D. BellSouth's is Wrong that its Obligations to Provide Certain UNEs are "Eliminated" by USTA II

As discussed above, CompSouth is concerned that, in the absence of an Order from this Authority directing BellSouth to maintain the full status quo under existing interconnection agreements, BellSouth may unilaterally attempt to use the vacatur of certain federal unbundling rules in *USTA II* to restrict the ongoing availability of UNEs at TELRIC rates in Tennessee before the Authority has resolved disputes as to the impact (if any) of *USTA II* on such agreements under the change of law provisions. Based on the above-referenced Carrier Notification letters, BellSouth has taken (at least at that time) the position that its obligations to provide certain UNEs would be "eliminated" if *USTA II* becomes effective. That argument must be rejected. Even if *USTA II* does become effective, the *TRO* will be remanded to the FCC for further consideration. And, since the D.C. Circuit's ruling focuses only on perceived procedural and analytical insufficiencies in the FCC's *TRO* -- nothing in *USTA II* requires the FCC to find that *any* current UNE may not continue to be required at TELRIC rates Perhaps more importantly, nothing in *USTA II* invalidates *either* the unbundling requirements in the Telecommunications Act of 1996 *or* the terms of existing interconnection agreements, nor does it impact this Authority's

power to supervise the implementation of interconnection agreements or its authority to act pursuant to federal or Tennessee law to preserve competition As the FCC notes, "[i]n the absence of binding federal rules, state commissions will be required to determine not only the effect of [*USTA II*] on the terms of existing agreements but also the extent to which mass market switching and dedicated transport should remain available under state law." FCC Motion at 9. And, of course, *USTA II* does not affect in any way the propriety of TELRIC pricing, which was conclusively resolved by the Supreme Court in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)

III. CONCLUSION

BellSouth's recent actions and statements have created enormous confusion. BellSouth is unwilling to expressly commit that it will maintain the status quo regarding rates, terms and conditions applicable to CompSouth members' agreements and to honor its contractual and statutory obligations, including its obligation to seek amendments to existing interconnection agreements through the processes contained in those agreements to effectuate changes in law. Competitive carriers must have certainty that the rates, terms and conditions contained in interconnection agreements will remain binding obligations after June 15 if they are to continue to market and develop innovative services and pricing and bring competitive benefits to Tennessee consumers.

In the past, BellSouth generally has abided by the provisions of interconnection agreements that prescribe how those agreements can be amended when regulatory uncertainty exists But its recent actions and statements call into question its current intentions As stated by BellSouth's counsel, those provisions call for notice and negotiation and ultimately, resolution by the state commissions of any disputes as "whether

the law has changed, what the change if law is and what the contract ought to say." BellSouth's unwillingness to categorically commit to maintain the status quo and follow those same processes today is, in all likelihood, due to the different marketplace circumstances that exist today compared to those that existed during the prior litigations. BellSouth has now received the all the benefits of the section 271 "trade off" and is now rapidly acquiring substantial market share in the long distance market as a result. Thus, BellSouth no longer has any incentive to act in a manner that is supportive of local competition.

For the foregoing reasons, CompSouth supports XO's request that the Authority declare that BellSouth be required to maintain the status quo, to continue offering all existing unbundled network elements under the terms and conditions and prices set forth in BellSouth's SGAT and existing interconnection agreements, unless and until the Authority approves any modifications to those agreements and to abide by the change-of law provisions contained in those agreement

This 3rd day of June, 2004.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By _____

Henry Walker (No. 000272)
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

Attorney for CompSouth

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to:

Guy Hicks
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

on this the 3rd day of June, 2004

Henry Walker

EXHIBIT 1

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084043

Date: March 23, 2004

To: All Competitive Local Exchange Carriers (CLEC)

Subject: CLECs (Product/Service) - Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Service

On March 2, 2004, the United States Court of Appeals for the District of Columbia ("Court") issued its opinion (Order) in the appeal of the Federal Communication Commission's (FCC) Triennial Review Order (TRO). The Court vacated and/or remanded significant portions of the TRO. Specifically, the Court vacated the FCC's rules associated with, among other items, mass-market switching, thereby eliminating BellSouth's obligation to provide unbundled switching and, therefore, Unbundled Network Elements-Platform (UNE-P) at TELRIC rates. The Court's Order will become effective May 1, 2004, unless the Court grants a rehearing or issues a stay of the Order.

In light of the Court's Order, BellSouth is prepared to offer switching and DS0 loop/switching combinations (including what is currently known as UNE-P) at commercially reasonable and competitive rates. BellSouth will offer switching via a DS0 Wholesale Local Voice Platform Services commercial agreement. Consistent with the direction provided by FCC Chairman Michael Powell, BellSouth invites your company to enter into good faith negotiations of a market-based commercial agreement aimed at benefiting the end user, establishing stability in the industry and allowing real competition to continue throughout the BellSouth region. Entering into such an agreement will effect an efficient transition from switching under your existing Interconnection Agreement to switching offered on a commercial basis.

Highlights of this offer are as follows:

Availability:
This offer is available until May 1, 2004

Term:
Agreements executed before May 1, 2004, will be effective through December 31, 2007.

Rates:
The Agreement establishes a rate schedule for the DS0 Wholesale Local Voice Platform Services and standalone DS0 switch ports for the entire contract period.

Mass Market (less than 4 DS0 lines per end user):
- $7 above existing state-ordered TELRIC UNE-P recurring rates*
- Discounts in 2004 result in a zero net increase above TELRIC*
- Transitional discounts in January 2005 through December 2006

* Rates ordered prior to June 24, 2003 in Georgia

Mass Market (cont.):
- Standalone DS0 switch ports at $7 increase over existing state-ordered TELRIC recurring rates* with no transitional discounts

Enterprise Market (four or more DS0 lines or where a DS1 is serving an end user):
- Provides a $10 increase over current DS0 state-ordered TELRIC UNE-P recurring rates* and applies to both DS0 Wholesale Local Voice Platform Services and standalone DS0 ports

Significant General Terms:

- Customer may continue to purchase standalone Loops or Resale Services under a BellSouth interconnection agreement and/or tariff.
- Guaranteed service metrics are offered through a service level commitment and are subject to payments by BellSouth to the customer for non-performance
- Prices, excluding discounts, for DS0 Wholesale Local Voice Platform Services will remain constant over the term of the Agreement.
- Damages will apply for non-compliance with the terms of the Agreement.

This offer is available only until May 1, 2004. Again, BellSouth invites you to enter into good faith negotiations of a commercial agreement as soon as possible in order to complete these negotiations by May 1.

To begin the negotiation process or obtain additional information, please contact Valerie Cottingham at 205-321-4970.

Sincerely,

Original signed by Jerry Hendrix

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

* Rates ordered prior to June 24, 2003 In Georgia

EXHIBIT 2

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084073

Date: April 26, 2004

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs - (Product/Service) – **REMINDER** - Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Services

This is a reminder that the negotiation timeframe for a Commercial Agreement for BellSouth's DS0 Wholesale Local Voice Platform Services outlined in **Carrier Notification Letter SN91084043**, posted on March 23, 2004, is only available until May 1, 2004.

Please refer to **Carrier Notification Letter SN91084043** for complete details.

Sincerely,

Original Signed by Jerry Hendrix

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT 3

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084063

Date: April 22, 2004

To: All Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Commercial Offering for BellSouth Unbundled Network Element (UNE) Transport Transition

Upon the DC Circuit Court's effective vacatur of portions of the FCC's Triennial Review Order, BellSouth's obligation to provide dedicated transport and high capacity loops as an unbundled network element pursuant to Section 251 of the Telecommunications Act of 1996 will be eliminated. As such, and due to general regulatory uncertainty, BellSouth is preparing to offer its dedicated transport and high capacity loops products solely via its access tariffs.

Until June 15, 2004, BellSouth is offering a two-party transition plan to effect an efficient and coordinated transition from UNE transport and high capacity loops under your company's existing Interconnection Agreement to transport offered via BellSouth's tariffs.

This offer is available only until June 15, 2004. BellSouth invites your company to enter into good faith negotiations of this plan as soon as possible in order to complete these negotiations by June 15, 2004.

To begin the negotiation process or obtain additional information, please contact Shemega Goodman at 404.927.7571.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT 4

OFFICIAL COPY

BellSouth Telecommunications, Inc.
Legal Department
1521 BellSouth Plaza
P. O. Box 30188
Charlotte, NC 28230

edward.rankin@bellsouth.com

Edward L. Rankin, III
General Counsel-North Carolina

704 417 8833
Fax 704 417 9389

May 24, 2004

FILED
MAY 24 2004
Clerk's Office
N.C. Utilities Commission

Ms. Geneva S. Thigpen
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket No. P-100, Sub 133q and Sub 133s

Dear Ms. Thigpen:

This letter responds to the letter of Mr. Ralph McDonald filed on behalf of CompSouth on May 17, 2004. Mr. McDonald requests a status conference based upon an incorrect premise; namely, that BellSouth has threatened unilateral action with respect to its interconnection agreements. Mr. McDonald's premise is incorrect, and, as stated more fully below, there is no need for Commission action. BellSouth does not object to participating in a status conference for informational purposes; however, there is no need for this Commission to "address this issue as soon as possible" by taking some unstated action, nor is there any danger of any imminent disruption to the North Carolina telecommunications industry as Mr. McDonald ominously predicts.

Concerning the Carrier Notification Letter issued by BellSouth on April 22, 2004, that letter invited Competing Local Providers ("CLPs") to enter into negotiations of a commercial agreement for the purchase of dedicated transport and high capacity loops. This invitation resulted from the call by Federal Communications Commission ("FCC") Chairman Michael Powell, echoed by other members of the FCC, for carriers to enter into commercial negotiations to resolve the uncertainty created by the D.C. Circuit Court of Appeals decision vacating portions of the *Triennial Review Order*.[1]

The Carrier Notification Letter attached to Mr. McDonald's letter does not threaten or even suggest that BellSouth will take unilateral action with respect to its interconnection agreements. Rather, the Carrier Notification Letter simply advised CLPs that: (1) once *USTA II*

[1] 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) ("*Triennial Review Order*"), *reversed in part on other grounds, United States Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

becomes effective, "BellSouth's obligation to provide dedicated transport and high capacity loops as an unbundled network element pursuant to Section 251 of the Telecommunications Act of 1996 will be eliminated"; (2) with the prospect of the *USTA II* vacatur taking effect and as a result of "regulatory uncertainty," BellSouth advised that it was "preparing to offer its dedicated transport and high capacity loops products solely via its access tariffs"; and (3) until June 15, 2004, BellSouth indicated that it was "offering a two-party transition plan to effect an efficient and coordinated transition" from dedicated transport and high capacity loops purchased at TELRIC rates under existing interconnection agreements to services offered via BellSouth's tariffs and invited CLPs "to enter into good faith negotiations of this plan as soon as possible in order to complete these negotiations by June 15, 2004."

Nothing in this Carrier Notification Letter should be read to suggest that BellSouth has threatened unilateral action concerning high capacity dedicated transport and high capacity loops pursuant to the provisions of applicable interconnection agreements. However, in the event that any of CompSouth's member companies are laboring under a genuine misunderstanding about the meaning of BellSouth's Carrier Notification Letter, BellSouth has posted another Carrier Notification Letter to clarify its position. A copy of the letter is attached hereto. The letter expressly states that "if the rules are vacated, BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under the CLEC's interconnection contract." BellSouth trusts this will resolve any confusion on the part of CompSouth's members.

Moreover, BellSouth has recently concluded negotiations with US LEC of North Carolina, Inc. ("US LEC") regarding the parties' new interconnection agreement. The parties negotiated a mutually agreed upon transition plan that addresses an orderly migration from unbundled network elements to special access services. BellSouth has filed today under separate cover a copy of this transition plan as incorporated into Attachment 2 of the parties' agreement. The negotiated transition plan demonstrates how carriers can and should mutually agree to a process for transitioning from unbundled network elements to other service arrangements, as contemplated by BellSouth's April 22, 2004 Carrier Notification Letter.

Please stamp the extra copy of this letter "Filed" and return it to me in the usual manner. Thank you for your assistance in this matter.

Sincerely,

Edward L. Rankin, III

Edward L. Rankin, III

ELR/db
Enclosures
cc: Parties of record

EXHIBIT 5

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084106

Date: May 24, 2004

To: Facility-Based Competitive Local Exchange Carriers (CLEC)

Subject: Facility-Based CLECs – (Business/Operations Process) - Provision of Service to CLECs Post-Vacatur

The District of Columbia Circuit Court of Appeals' March 2, 2004, Opinion vacating certain Federal Communications Commission (FCC) Unbundled Network Element (UNE) rules is scheduled to become effective on June 16, 2004 This letter is to affirm that BellSouth will not unilaterally breach its interconnection agreements. Upon vacatur of the rules, BellSouth does intend to pursue modification, reformation or amendment of existing Interconnection Agreements (with the exception of new commercial and transition agreements) to properly reflect the Court's mandate. Rumors have been circulating that, upon vacatur, services that BellSouth now provides to CLECs under their Interconnection Agreements will be disconnected. Contrary to such rumors, if the rules are vacated, BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.

If you have any questions, please contact your BellSouth contract manager.

Sincerely,

ORIGINAL SIGNED BY KRISTEN ROWE FOR JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Telecom Association, *et al.*, Petitioners,	)	
v.	)	No. 00-1012 (and consolidated cases)
Federal Communications Commission and United States of America, Respondents.	)	

MOTION OF THE FEDERAL COMMUNICATIONS COMMISSION TO STAY THE MANDATE PENDING THE FILING OF PETITIONS FOR A WRIT OF CERTIORARI

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 41(a)(2), the Federal Communications Commission respectfully moves for a stay of the mandate in this case pending the filing of timely petitions for certiorari. We request that the Court rule on this motion by June 4, 2004, so that the Commission will have time to seek a stay from the Supreme Court in the event that this Court denies this motion.

BACKGROUND

In the Telecommunications Act of 1996 ("1996 Act"), Pub L No. 104-104, 110 Stat 56, Congress took steps to introduce competition into local telecommunications markets that historically had been monopolized by incumbent local exchange carriers ("ILECs"). Under the statute, ILECs "are subject to a host of duties intended to facilitate market entry " *AT&T Corp v Iowa Utilities Board,* 525 U.S. 366, 371 (1999) "Foremost among these duties" is incumbents' obligation under 47 U.S.C. § 251(c) to share their networks with competing local exchange carriers ("CLECs") *Ibid* In particular, section 251(c)(3) requires ILECs to provide requesting CLECs with "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C § 251(c)(3). For purposes of determining which network elements should be made

available under section 251(c)(3), Congress directed the FCC to "consider, at a minimum," whether "access to such network elements as are proprietary in nature is *necessary*," and whether, as to nonproprietary elements, "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(A)-(B) (emphasis added).

The Supreme Court vacated the FCC's original unbundling rules, holding that the Commission had failed to give any substance to the "necessary" and "impair" standards set forth in section 251(d)(2). *AT&T,* 525 U S. at 387-92. In response, the FCC substantially revised its interpretation of section 251(d)(2) and adopted new unbundling rules. On review, this Court vacated the new unbundling rules for nonproprietary elements, ruling that the FCC had failed to perform a sufficiently "nuanced" analysis of impairment under section 251(d)(2). *United States Telecom Ass'n v FCC,* 290 F.3d 415 (D.C. Cir 2002) (*"USTA I"*).

In the wake of *USTA I,* the Commission concluded its Triennial Review of its unbundling rules by adopting a more "granular" framework for assessing impairment that takes into account market-specific variations and that focuses on the sorts of costs that pose recognized barriers to competitive entry *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16798 (2003) (*"Order"*), *corrected by Errata,* 18 FCC Rcd 19020 (2003). Applying its revised impairment test, the Commission relieved ILECs of a substantial number of unbundling obligations. *See generally Order* ¶¶ 4, 7.

On March 2, 2004, the Court issued an opinion affirming in part and reversing in part the Triennial Review *Order. United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*). Among other things, the Court vacated FCC rules that required ILECs to unbundle and lease certain switching and transport facilities to CLECs. *Id.* at 568-71, 573-74. In doing so,

the Court held that the FCC could not make nationwide impairment findings and leave it to the states to make exceptions in particular markets. 359 F.3d at 564-71. Instead, the Court held that the agency was required to engage in a market-specific analysis that took account of any "narrower alternatives," 359 F 3d at 569-71, and that considered, among other things, the impact of universal service subsidies, *id.* at 573, and available ILEC tariffed offerings, *id.* at 576-77. The Court stated that it would "temporarily stay the vacatur (i.e., delay issue of the mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from" the date the opinion was released. *Id.* at 595. No party filed for rehearing.

After the Court issued the *USTA II* decision, all five FCC Commissioners jointly issued a letter calling for ILECs and CLECs to enter into good faith negotiations in an effort to resolve their differences over the terms and conditions that should govern unbundling of network elements. In order to accommodate these negotiations, which are ongoing, the FCC and the United States filed a motion (to which all parties consented) seeking to extend the stay of the mandate by 45 days. On April 13, 2004, the Court granted the motion and extended the stay of the mandate until June 15, 2004.

The FCC now respectfully requests that the Court stay its mandate pending the filing of any timely petitions for certiorari. The original deadline for seeking certiorari in this case was May 31, 2004 By order dated May 19, 2004, Chief Justice Rehnquist granted the government's motion to extend the deadline for filing certiorari petitions until June 30, 2004. Although the Solicitor General has not yet decided whether to petition for certiorari in this case, he has authorized us to represent that he believes there is good cause for a stay of the mandate. In addition, we understand that some CLECs that intervened in support of the FCC in this case intend to petition for certiorari.

ARGUMENT

In order to obtain a stay of the mandate pending a petition for certiorari, a party "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); *see also* D C. Cir. R. 41(a)(2). This motion satisfies those requirements

1. *This case is a substantial candidate for certiorari.* The Supreme Court has described the 1996 Act as "an unusually important legislative enactment." *Reno v ACLU,* 521 U.S. 844, 857 (1997). By providing a framework for introducing competition into telecommunications markets, the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T,* 525 U.S. at 397. Recognizing the significance of this statute, the Supreme Court has previously granted certiorari in two cases involving the terms and conditions of competitors' access to incumbent carriers' unbundled network elements. *See ibid*; *Verizon Communications Inc. v FCC,* 535 U.S. 467 (2002) Like those cases, this case involves substantial questions that have enormous implications for the development of competition in telecommunications markets

a. First, this Court struck down the Commission's "delegation" to state commissions of a part of its function of designating unbundled network elements, holding that the FCC may not subdelegate this function to a state "absent affirmative evidence" that Congress authorized it to do so. *USTA II,* 359 F.3d at 566. That ruling ignores the structure and terms of the 1996 Act, which indicate that Congress contemplated a significant state role in designating network elements. State commissions under the Act have the responsibility to mediate, arbitrate, and approve individual interconnection agreements between incumbents and new entrants and to approve general statements regarding interconnection that apply to all carriers within a state –

including unbundling rights and obligations. 47 U.S.C. § 252(a)-(c), (e); *see also id* § 251(d)(3) (preserving the authority of states to enforce their own unbundling regulations, so long as those rules are consistent with section 251 and do not substantially prevent implementation of the 1996 Act's local competition provisions); *id.* § 251(f) (authorizing states to suspend or modify statutory rural carrier exemptions from general unbundling obligations, and to exempt small ILECs from FCC-prescribed unbundling obligations). As the Supreme Court has recognized, the local competition provisions of the 1996 Act create "a hybrid jurisdictional scheme" in which the states participate extensively in the Act's implementation. *Verizon,* 535 U.S. at 489; *see also AT&T,* 525 U.S at 378 n 6, 384. And where (as here) a statutory scheme that is jointly administered by federal and state officials expressly gives states a role in making the same or similar determinations, the Supreme Court has held that federal agencies can exercise their rulemaking authority to "subdelegate" the determination of a federal issue to a state tribunal. *See Wisconsin Department of Health & Family Services v. Blumer,* 534 U.S. 473, 497 (2002); *Batterton v Francis,* 432 U.S 416, 423 (1977).

b. In addition, this Court's rationale for vacating the FCC's unbundling rules for mass market switching and dedicated transport is inconsistent with the Supreme Court's interpretation of the 1996 Act in *AT&T* and *Verizon.* As the Court found in *AT&T,* the 1996 Act can reasonably "be read to grant ... 'most promiscuous rights' ... to competing carriers vis-à-vis the incumbents " 525 U.S. at 397. Indeed, the Court in *Verizon* said that the statute was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." 535 U.S. at 489. The *Verizon* Court also affirmed the FCC's power "to ensure that the statutory duty to provide unbundled network elements gets a practical result." *Id.* at 532.

This Court's decision precludes the FCC from pursuing the statutory objectives that the Supreme Court recognized in *AT&T* and *Verizon*. Far from giving potential competitors "every possible incentive" to enter local telecommunications markets (*Verizon,* 535 U.S at 489), the ruling in this case, which requires the FCC to take drastic steps to minimize the availability of unbundled network elements, will effectively remove one of the most powerful incentives to market entry provided by the 1996 Act, thereby ensuring that the statutory unbundling provisions will not achieve the "practical result" intended by Congress. (*id* at 532).

This Court has imposed a variety of constraints on the FCC's impairment analysis that cannot be found in the statute. It has held that the FCC must consider all conceivable "narrowly-tailored alternatives" to unbundling before the agency can require unbundling. *USTA II,* 359 F.3d at 570-71. It has directed the Commission to consider the availability of ILEC tariffed service offerings when assessing impairment. *Id.* at 575-77. It also has ordered the agency to examine the impact of universal service "cross-subsidies" in areas where states set retail phone rates below cost. *Id* at 573.

To justify its imposition of these extra-statutory restrictions on unbundling, the Court asserted that the "goals" of the 1996 Act required the Commission, in conducting its impairment analysis, to balance "the costs of unbundling," including the disincentive to investment, against its benefits. *USTA II,* 359 F.3d at 563, 572 It based this assertion on its conclusion in *USTA I* that such a balance was called for "explicitly by Justice Breyer" in his separate opinion in *AT&T* and "implicitly by the Court as a whole" in that case. *USTA I,* 290 F.3d at 427 (citing *AT&T,* 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part)). But the Supreme Court in *Verizon* (over Justice Breyer's lone dissent) expressly rejected the contention that mandatory unbundling at FCC-established TELRIC rates would produce "not competition, but a

sort of parasitic free riding, leaving TELRIC incapable of stimulating the facilities-based competition intended by Congress." 535 U.S. at 504 Contrary to the position espoused by Justice Breyer in his separate opinions in *AT&T* and *Verizon,* the Court in *Verizon* concluded that the Commission's prescription of TELRIC pricing for network elements "is not easily described as an unreasonable way to promote competitive investment in facilities," particularly in light of the record evidence of substantial facilities investment by CLECs and ILECs. *Id.* at 517. Moreover, contrary to this Court's suggestion, the *Verizon* Court made clear that the Commission was not compelled to give controlling weight to investment disincentives when deciding whether to require unbundling. Rather, the Court held that the FCC could reasonably encourage new entrants "to compete in less capital-intensive facilities," even though potential competitors would have "lessened incentives to build their own bottleneck facilities" *Id* at 510

This Court's imposition of extra-statutory restrictions on unbundling not only conflicts with the Supreme Court's interpretation of the Act's expansive pro-competitive objectives, but also is inconsistent with the deferential standard of review that the Supreme Court applied to the FCC's local competition rules in *AT&T* and *Verizon.* This Court has acknowledged that Congress "gave no detail as to either the kind or degree of impairment" that would warrant unbundling under the standard prescribed by section 251(d)(2). *USTA I,* 290 F.3d at 422. Reviewing courts "can only enforce the clear limits that the 1996 Act contains." *AT&T,* 525 U S. at 397 (citing *Chevron U S.A , Inc v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984)) Thus, "the job of judges" is not to assess "[w]hether the FCC picked the best way" to promote local competition, but merely "to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them." *Verizon,* 535 U.S. at 539. *See also AT&T,* 525 U.S. at

397 ("the 1996 Act is not a model of clarity," and "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency").

2. *There is good cause for a stay.* If this Court's mandate is not stayed, both the FCC and state commissions will be forced to undertake, presumably on an emergency basis, extremely burdensome proceedings to establish new rules and arrangements for access to unbundled elements. The devotion of considerable federal and state resources to such complex and burdensome tasks would prove entirely wasteful and unnecessary if the rules that this Court vacated are ultimately upheld by the Supreme Court.

The FCC will have to commence new rulemaking proceedings to reconsider the extent to which it should order unbundling of mass market switching and dedicated transport in light of *USTA II* Any such proceeding would require the FCC to comply with the numerous extra-statutory requirements this Court has imposed. *See* page 6 *supra.* Specifically, as a prerequisite to ordering unbundling, the FCC may have to conduct a detailed market-by-market analysis – a task that state commissions operating under the *Triennial Review Order* were struggling to complete within the 9-month timeframe established for such proceedings. The Court's decision would also require the FCC to consider the feasibility of all potentially narrower alternatives to unbundling, and to address the significance of the availability of tariffed services as an alternative to unbundled elements and the effects of implicit subsidies. These would be tasks of enormous scope and complexity and would demand a very substantial commitment of resources from the Commission to complete in a timely manner. In the meantime, the Commission may have to consider adopting interim rules to avoid a sudden curtailment of competition in many local markets.

State commissions will also have to conduct enormously burdensome proceedings in the immediate aftermath of the mandate's issuance to determine the rights of competitors and incumbents under existing "interconnection agreements." Under the Act, those agreements embody the respective rights and obligations of competitors and incumbents respecting unbundled elements, and virtually all of the hundreds of extant interconnection agreements will be affected, through change of law provisions, by the issuance of this Court's mandate. In the absence of binding federal rules, state commissions will be required to determine not only the effect of this Court's ruling on the terms of existing agreements but also the extent to which mass market switching and dedicated transport should remain available under state law. Such proceedings would impose enormous pressure on the limited resources of state commissions as well.

Justices of the Supreme Court have concluded that, pending the filing and disposition of a petition for certiorari, a stay of a judicial mandate is warranted when, as here, issuance of the mandate "would impose a considerable administrative burden" on an agency by requiring substantial alteration of the existing regulatory regime. *INS v Legalization Assistance Project of the Los Angeles County Fed'n of Labor,* 510 U S. 1301, 1305 (O'Connor, Circuit Justice 1993); *see also Ledbetter v. Baldwin,* 479 U.S. 1309, 1310 (Powell, Circuit Justice 1986) (entering stay so that agency would not have to "bear the administrative costs of changing its system to comply with" a lower court's mandate); *Heckler v. Redbud Hosp Dist.,* 473 U.S. 1308, 1314 (Rehnquist, Circuit Justice 1985) (staying court order that would have required "significant readjustment in the administration of" a federal program); *Heckler v. Blankenship,* 465 U.S. 1301, 1302 (O'Connor, Circuit Justice 1984) (staying court order that "would, in all likelihood, require a substantial restructuring of" the process for adjudicating disability claims under the Social

Security Act); *Edelman v Jordan,* 414 U.S. 1301, 1303 (Rehnquist, Circuit Justice 1973) (staying court order that mandated procedures that "might prove to be entirely useless" if the Supreme Court subsequently reversed or modified the judgment). *Accord Books v. City of Elkhart,* 239 F 3d 826, 829 (7th Cir. 2001) (when "the formulation of a remedy" by government officials in response to an appellate court decision "would require significant time and attention," "the public interest is best served by affording the [government] a full opportunity to seek review in the Supreme Court .. before its officials devote attention to formulating and implementing a remedy"); *National Citizens Committee for Broadcasting v FCC,* 555 F.2d 967, 970 (D.C. Cir. 1977) (granting a stay in view of the "substantial burdens" that the FCC would incur absent a stay). The same considerations of unwarranted administrative burden that justified stays in those cases justify a stay of the mandate in this case, in order to avoid the necessity of conducting federal and state proceedings to modify unbundling requirements that the Supreme Court may ultimately uphold.

A stay also is warranted to preserve stability in telecommunications markets. Issuance of the mandate in this case would immediately create regulatory uncertainty and market disruption by re-opening a number of the issues that the FCC resolved in the *Order.*

During the periods following vacatur and remand of the Commission's impairment standard and unbundling rules in *AT&T* and *USTA I,* the Bell operating companies (the largest ILECs) agreed to continue abiding by the vacated unbundling rules pending the adoption of

permanent rules.[1] But none of the ILECs have made any such voluntary commitments in this case. To the contrary, many of the largest ILECs have indicated that once the mandate issues, they will immediately stop providing certain network elements at TELRIC rates, notwithstanding the terms of existing interconnection agreements.[2] The potential for disruption could cripple CLECs' ability to retain existing customers and to attract new ones. *See Order* ¶¶ 466-467. The resulting market uncertainty might jeopardize the ability of CLECs to maintain investment and financing. And if ILECs carry out their plans to raise the rates CLECs must pay for network access, this would threaten higher retail phone rates for consumers.

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[1] *See Common Carrier Bureau Establishes Rapid-Response System To Minimize Disputes Arising From Supreme Court's Iowa Utilities Board Order,* Public Notice, 14 FCC Rcd 4061 (1999) (citing letters from Bell companies and GTE stating the carriers' willingness to maintain the status quo regarding unbundled access following the Supreme Court's vacatur of the unbundling rules). After this Court's decision in *USTA I,* the Court initially stayed its mandate until January 2, 2003 *See USTA I,* Nos. 00-1012, 00-1015 (D.C. Cir. Sept. 4, 2002) The FCC and the Bell companies later filed a consent motion to extend the stay of the mandate through February 20, 2003. The Court granted that motion. *See USTA I,* Nos. 00-1012, 00-1015 (D.C. Cir. Dec. 23, 2002).

[2] *See* BellSouth Carrier Notification, April 22, 2004 (Attachment A) (upon issuance of the mandate, "BellSouth's obligation to provide dedicated transport and high capacity loops as an unbundled network element pursuant to Section 251 ... will be eliminated," and "BellSouth is preparing to offer its dedicated transport and high capacity loops products solely via its access tariffs"); Reply Comments of Verizon New York before the New York Public Service Commission, Case 04-C-0420, April 23, 2004, at 3-14 (Attachment B) (once the mandate "takes effect, Verizon will have no legal obligation to continue offering mass-market circuit switching or dedicated transport at TELRIC rates"); Letter from Gary L. Phillips, SBC, to Steven A. Augustino, Kelley Drye & Warren, May 19, 2004, at 1 (Attachment C) (once the mandate issues, "SBC's affiliated incumbent LECs will not be required to make [high-capacity loops and transport] available 'pursuant to section 251'")

CONCLUSION

For the foregoing reasons, the Court should grant the motion and stay the mandate pending the filing of timely petitions for certiorari.

Respectfully submitted,

John A. Rogovin
General Counsel

Jacob M Lewis
Associate General Counsel

John E. Ingle
Deputy Associate General Counsel

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

May 24, 2004

EXHIBIT 7

Edward L. Rankin, III
General Counsel - North Carolina

BellSouth Telecommunications, Inc.
1521 BellSouth Plaza
P. O. Box 30188
Charlotte, North Carolina 28230
Telephone: 704-417-8833
Facsimile: 704-417-9389

May 28, 2004

OFFICIAL COPY

FILED

MAY 28 2004

Clerk's Office
N.C. Utilities Commission

Ms. Geneva S Thigpen
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket No. P-100, Sub 133q and Sub 133s

Dear Ms. Thigpen

On May 26, 2004, this Commission held a teleconference to discuss the above-listed dockets. During this conference, BellSouth clarified its position concerning the D.C. Circuit Court of Appeals decision vacating portions of the *Triennial Review Order*. BellSouth also posted a Carrier Notification Letter on May 24, 2004 to set forth its position.

BellSouth intended to alleviate apparent uncertainty on the part of some carriers. Apparently, some carriers purport to remain confused As provided in BellSouth's May 24, 2004 Carrier Letter Notification, BellSouth will not "unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement." Consequently, there will be no chaos as the CLECs allege BellSouth will effectuate changes to its interconnection agreements via established legal procedures

With respect to new or future orders, "BellSouth will not unilaterally breach its interconnection agreements." If the D.C Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept and process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those services in accordance with the terms of existing interconnection agreements, until such time as those agreements have been amended, reformed, or modified consistent with the D.C. Circuit's decision pursuant to established legal processes. As it is legally entitled to do, BellSouth reserves all rights, arguments, and remedies it has under the law with respect to the rates, terms, and conditions in the agreements

I trust this additional information adequately addresses any remaining questions that CLECs have raised in connection with these dockets. Please stamp the extra copy of

this letter "Filed" and return it to me in the usual manner. Thank you for your assistance in this matter

Sincerely,

Edward L. Rankin, III

Edward L. Rankin, III

ELR/db
cc: Parties of record

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