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June 3, 2004

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *XO Petition for Declaratory Ruling Requiring BellSouth Telecommunications, Inc. to Honor Existing Interconnection Agreements*
Docket No. 04-00158

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Response to Petition for Declaratory Ruling*. Copies of the enclosed are being provided to counsel for XO.

Cordially,

Joelle Phillips

JJP:ch

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

June 3, 2004

In Re: *XO Petition for Declaratory Order Requiring BellSouth Telecommunications, Inc. to Honor Existing Interconnection Agreements*

Docket No. 04-00158

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO PETITION FOR DECLARATORY ORDER

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to the *Petition for Declaratory Order* ("*Petition*") filed by XO Tennessee, Inc. ("XO"). XO's *Petition* rests upon a false premise and hyperbole; namely that BellSouth intends or has threatened to unilaterally discontinue its offering of local switching, transport, high capacity loop and dark fiber UNEs (collectively, "UNEs") to XO, "engage in drastic self-help remedies" and "... possibly even refus[e] to process any new XO orders for UNEs after June 15 ...."[1] Nothing could be further from the truth.

XO purportedly filed its *Petition* in response to Carrier Notification Letters issued by BellSouth on March 23 and April 22, 2004. Both letters invited Competing Local Exchange Carriers ("CLECs") to enter into discussions with BellSouth. The March 23, 2004 letter invited CLECs to negotiate the purchase of mass market switching at commercially reasonable rates. The April 22, 2004 letter invited CLECs to negotiate a transition plan for CLECs' access to dedicated transport and high capacity loops. Both letters were the result of the call by Federal Communications Commission ("FCC") Chairman Michael Powell, echoed by the other members of the FCC and members of

[1] See XO Petition at p 3 and fn 4 at p 2

the TRA, for carriers to enter into negotiations to resolve the uncertainty created by the D.C. Circuit Court of Appeals' decision vacating portions of the *Triennial Review Order*[2] The Authority has also encouraged parties to enter into such negotiations.[3]

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[2] 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)

[3] On more than one occasion, the Directors have urged parties to negotiate For example, Chairman Tate publicly echoed Chairman Powell's call to negotiate in a March 11, 2004 press release and specifically noted the importance of this effort for Tennessee's economy and for customers in Tennessee Likewise, on March 30, 2004, Director Kyle added her comments to the record during the TRO hearing, saying

> Like many of you here today, I too have followed closely the statements made by FCC members and I believe our own TRA directors in response to the TRO recent developments
>
> So many have encouraged the industry to start working together toward commercial agreements rather than continuing down the long and often unproductive path of litigation in the courts and state utility commissions I think the industry should work earnestly to arrive at commercially negotiated rates and feel that a call for parties to help ensure some stability during this critical time not only for the economy here in Tennessee, but also for their own customers is appropriate
>
> I think it is not enough for state utility commissions to merely encourage negotiations and to hope that the parties will turn away from litigation and turn instead to working within the competitive marketplace - - a competitive marketplace we have all worked so hard to bring about in Tennessee
>
> I think we must be prepared to back up our preference for negotiated business agreements with our actions as regulators We must recognize that parties will not negotiate when they think they stand to gain more from the intervention of regulators They will not get down to the business of negotiating rates when they believe that regulators are standing by ready to set rates for them as if we were still operating in an environment free from competition This is not the environment in Tennessee
>
> As you well know, Tennessee enacted its Telecommunications Act ahead of Congress, and the Tennessee Regulatory Authority should continue to lead the industry down the path as set by our legislators
>
> For these reasons, I think we must look for opportunities in all our pending dockets to urge parties to resolve some issues themselves We will always be here to resolve issues that parties truly cannot work out, but we must be judicious about stepping in too soon, so that our market has a chance to work When our markets work on their own, we can be sure that we have done our jobs as directors to bring about competition that our legislative body demands and that the Tennessee consumers deserve
>
> I am glad to see, for example, that BellSouth has announced a commercial offer regarding UNE-P I applaud the panel in the DeltaCom arbitration for its decision to give that offer some time before ruling on the related issue within that docket I think this kind of common-sense approach by regulators is the best way we can help to see that our telecommunications providers look first to the commercial market before looking to regulation to resolve issues, and I think that will ultimately benefit Tennessee consumers Transcript 9-11

Importantly, neither of these Carrier Notification Letters threaten or even suggest that, as XO claims, BellSouth intends to unilaterally discontinue the offering of local switching, dedicated transport, high capacity loops and dark fiber at the rates, terms, and conditions in the XO Interconnection Agreement. Rather, the March 23, 2004 Carrier Notification Letter simply advised CLECs that:

- On March 2, 2004, the United States Court of Appeals for the District of Columbia vacated and/or remanded significant portions of the TRO including the FCC's rules associated with mass-market switching;

- 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 invited CLECs 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.

Likewise, the April 22, 2004 Carrier Notification Letter simply advised CLECs that:

- Once the D.C. Circuit's order vacating portions of the FCC's *Triennial Review Order* becomes effective, which is expected to occur on June 15, 2004, "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";

- With the prospect of the D.C. Circuit's 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";

- 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 CLECs "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 either of these Carrier Notification Letters can reasonably be read to suggest that BellSouth intends to " .. refuse to process any new XO orders..." or unilaterally cease to offer local switching, transport, high capacity loops and dark fiber at the TELRIC rates contained in XO's Interconnection Agreement

However, in the event XO was laboring under a genuine misunderstanding about the meaning of BellSouth's Carrier Notification Letters, any such misunderstanding should have been resolved by BellSouth's May 10, 2004 letter to XO, a copy of which is attached as Exhibit A. In this letter, BellSouth pointed out to XO that "[n]owhere in the Carrier Notification Letter was there any discussion or indication that BellSouth will unilaterally breach the Interconnection Agreement and ***it is not BellSouth's intent to do so.***" BellSouth's letter further advised XO that BellSouth "recognizes its obligations under the existing Interconnection Agreements, but will pursue the legal and regulatory options available to it once the *vacatur* becomes effective." Finally, the May 10 letter reiterated that BellSouth is offering a transition plan for CLECs' access to high capacity dedicated transport and high capacity loops.

As a result of BellSouth's May 10, 2004 letter, which XO had before it filed its *Petition*, XO cannot seriously believe that BellSouth intends to "refuse to process any new XO orders" or "engage in drastic self-help remedies", as suggested in XO's *Petition*.

Moreover, following the May 10, 2004 letter to XO, BellSouth issued a Carrier Notification Letter dated May 24, 2004 to all CLECs that stated:

> 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.[4]

In light of both the May 10 and May 24 letters, XO cannot seriously contend it fears unilateral "drastic self-help" action by BellSouth as alleged in its Petition. Likewise, the Declaration of Keith O Cowan and Jerry D Hendrix filed in the D.C. Circuit Court of Appeals provides further assurance of BellSouth's position. That Declaration is attached as Exhibit B.

Under the circumstances, there is simply no basis for proceeding further with XO's *Petition*. Because BellSouth has repeatedly stated that it will not "unilaterally breach its interconnection agreements" there is no need for the Tennessee Regulatory Authority ("TRA") to order BellSouth "to continue to provide access to UNEs" as requested by XO. It is difficult to see how it could be any clearer. BellSouth will honor its existing Interconnection Agreements until such time as established legal processes relieve BellSouth of that obligation. That may occur through the "change of law" provisions in the Interconnection Agreements themselves, by a generic proceeding held by the appropriate state or federal agencies, or by a proceeding filed in the appropriate court. However, BellSouth has stated clearly and without exception that it will not act unilaterally to modify or change the existing agreements. As a result, it should be clear that there is no "emergency" and further that there is no substantive merit to XO's Petition.[5]

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[4] A copy of this letter is attached as Exhibit B

[5] That there is no "emergency" was confirmed recently by the decision of CompTel/ASCENT, AT&T,MCI, and other CLECs to withdraw, without prejudice, their request for emergency relief filed with the Michigan Public Service Commission seeking to ensure continued access to unbundled network elements from SBC and Verizon should the D.C. Circuit's mandate take effect. *See* "CLECs Alter Petition To Ensure UNE Access," *Telecommunications Reports* (June 3, 2004). According to press reports, the CLECs said

Of course, XO's *Petition* seeks more than a declaration concerning its existing Interconnection Agreement, which is not and never should have been an issue in dispute. Actually, XO is asking the TRA to enter a broad, open-ended injunction requiring BellSouth to maintain the status quo even though the law and rules are changing (*See* XO *Petition* at pp. 4, 6). However, none of the provisions contained within T C.A. § 65-4-117 provide the TRA with the authority to enter such an order. XO really seeks to lead the TRA into a thorny legal briar patch by asking the TRA to declare that BellSouth is obligated to provide UNEs under state law and Section 271 of the federal Act.[6] The TRA should not follow XO's lead.

XO argues that the TRA should require BellSouth to continue providing unbundled access to UNEs under the T.C A. § 65-4-124 ("Tennessee Act"). The Tennessee Act does not authorize the relief that XO seeks.

As an initial matter, XO carefully avoids mentioning the policy behind the Tennessee Act – namely, to foster "the development of an efficient, technologically advanced, statewide system of telecommunications services . . . ." T.C.A. § 65-4-123. Indeed, the Tennessee General Assembly noted that the regulation of telecommunications services was not to cause "unreasonable prejudice or disadvantage to *any* telecommunications services provider." *Id*

Granting continued access to UNEs on a ubiquitous basis would neither foster an efficient, technologically advance, statewide system of telecommunications services in Tennessee, nor would it be without prejudice or disadvantage to BellSouth. As the D.C.

"they no longer feel the PSC needs to move on their request for emergency relief" because the CLECs "will take the ILECs at their word" that they "do not intend to take unilateral action in abrogation of the CLECs' rights under their respective interconnection agreements and tariffs." *Id.* There is no "emergency" in Michigan, and there is, likewise, no "emergency" in Tennessee

[6] See XO Petition at p 6

Circuit noted in striking down the FCC's second attempt at adopting unbundling rules, the "competition performed with ubiquitously provided ILEC facilities ..." is "completely synthetic competition" that does not fulfill Congress's purposes in enacting the 1996 Act. *See United States Telecom Association v FCC,* 290 F.3d 415, 424 (D.C. Cir. 2002) (*"USTA I"*), *cert denied, WorldCom, Inc. v. United States Telecom Association*, 155 L.Ed.2d 344 (2003). The same is true with respect to the Tennessee Act. Whatever "synthetic competition" that ubiquitous access to UNEs may bring about in Tennessee is inconsistent with the legislature's desire for a technologically advanced, statewide system which can only result from increased investment by all telecommunications carriers in telecommunications infrastructure in the state, rather than artificial competition that relies solely upon BellSouth's network.

In fact, while state law may empower the TRA to require local exchange companies to provide interconnection and certain unbundling,[7] it does not authorize the TRA to establish the price at which such unbundling must be provided, notwithstanding XO's claims to the contrary.[8] Nor is there anything in the state statutes XO cites even remotely suggesting that the TRA can mandate TELRIC-based rates. Specifically, T.C.A. § 65-5-209(g) only authorizes the TRA to establish initial rates for new interconnection services provided by an ILEC subsequent to June 6, 1995 if the rates cannot be agreed upon by the parties No mention is made of authorizing the TRA to establish rates, terms, or conditions for "unbundling." The TRA necessarily lacks such authority by virtue of having been expressly granted initial rate-setting authority over

[7] T C A § 65-4-124

[8] See XO Petition at p 6.

"new interconnection services."[9] The other state statutes XO relies upon all relate to retail, as opposed to wholesale, rates and therefore provide no authority for the TRA to mandate TELRIC-based wholesale rates.[10]

Moreover, even if ubiquitous access to UNEs were consistent with the purposes of the Tennessee Act (which it is not), BellSouth would not be the only carrier required to provide access to UNEs. This is because the Tennessee Act unambiguously provides that "*all telecommunications services providers* shall provide non-discriminatory interconnection to their public networks" and "*all telecommunications providers* shall . . . be provided . . . features, functions, and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers" T.C.A. § 65-4-124(a) (emphasis added). The requirement to provide interconnection and unbundling, which is apparently the language upon which XO's state unbundling argument is based, applies not just to BellSouth, but to every incumbent local exchange carrier and CLEC in Tennessee. Thus, if XO's dubious reading of the Tennessee Act were correct, XO and every other telecommunications services provider in Tennessee would have to provide unbundled access to their switches and other network infrastructure. Such a result is the illogical outcome of XO's interpretation of Tennessee law, although it is doubtful that XO had this result in mind or that carriers not participating in this proceeding would endorse this interpretation.

Another problem with XO's reliance on state unbundling law is the preemption standard in Section 251(d)(3) of the 1996 Act, which bars a state unbundling

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[9] The cannon of statutory construction *expressio unius est exclusio alterius* - meaning that the inclusion of one implies the exclusion of others – is well established See for example, Sutherland's Statutory Construction, 6th ed § 47 23 (noting that, as maxim is applied to statutory interpretation, omissions should be understood as exclusions)

[10] XO relies on T C A §§ 65-4-117, 65-4-104, 65-5-210

requirement that "thwarts or frustrates the federal regime ...." *Triennial Review Order* ¶ 192.[11] Although the FCC did not determine that additional state unbundling requirements were unlawful per se and did not preempt any specific state requirements, the FCC made clear that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the [FCC] has either found no impairment – and thus has found unbundling that element would conflict with the limits in Section 251(d)(2) – or otherwise declined to require unbundling on a national basis, *we believe it unlikely that such a decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of Section 251(d)(3)(C).*

Id. ¶ 195 (emphasis added). Thus, XO's suggestion that the TRA can go beyond existing FCC rules (that currently are in effect at least for the time being) by requiring that BellSouth to continue to provide UNEs in circumstances where the FCC has determined that such unbundling should not be required, the TRA would be "thwarting" and "frustrating" federal law, and any such order would be preempted.

Even in the absence of binding FCC rules (which would be the case if the D.C. Circuit mandate is issued), the TRA is not at liberty to adopt whatever unbundling requirements it may desire. Rather, any unbundling requirements imposed by the TRA that are "inconsistent" with the 1996 Act would be preempted. Thus, to the extent the TRA were to apply an impairment analysis contrary to the views of the D.C. Circuit by proceeding from the belief that "more unbundling is better," the TRA's actions would be unlawful. *See USTA I,* 290 F.3d at 425. Furthermore, in the absence of binding FCC rules, the TRA would have to adhere to the D.C. Circuit's interpretation of the federal impairment standard, which, with respect to switching, would require consideration of:

[11] Section 251(d)(3) provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission" that "establishes access and interconnection obligations of local exchange carriers" and that "is consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part."

(1) BellSouth's hot cut performance; (2) "narrowly-tailored alternatives to a blank requirement that mass market switches be made available as UNEs"; (3) a more thoroughly defined concept of "economic impairment"; (4) "intermodal alternatives," which, according to the D.C Circuit, cannot be ignored "when evaluating impairment"; and (5) the extent to which below-cost retail rates are connected "either with structural features that would make competitive supply wasteful or with any other purposes of the [1996] Act." *See USTA II,* slip op. at 22-25 Concerning high capacity loops, dark fiber, and transport, the TRA would have to consider: (1) facilities deployment along similar routes and to buildings when assessing impairment; (2) the availability of special access services; and (3) a more thoroughly defined concept of "economic impairment."[12]

If the TRA were to adopt an unbundling requirement without considering the Court's required factors, as XO appears to urge the TRA to do, the limitations that Congress imposed in the 1996 Act would be undermined. Such a result would be "inconsistent" with the requirements of the 1996 Act and thus preempted by federal law. *See* 47 U.S.C. § 261(b), (c); *Triennial Review Order* ¶ 192 (noting disagreement "with those that argue that states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." These commenters overlook the specific restraints on state actions found in Sections 261(b) and (c) of the Act") (footnotes omitted); *see also Indiana Bell v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004) (7th Cir. 2004) (finding that imposition of enforcement plan under Section 271 was inconsistent with the procedural scheme contemplated by the 1996 Act and thus was preempted); *AT&T Communications of Illinois v. Illinois Bell*, 349 F 3d 402

[12] See USTA II, slip op at 22-30

(7th Cir. 2003) (state statute mandating methodology for rates for unbundled network elements was inconsistent with TELRIC and thus preempted).

The uncertainty of the FCC's rules underscores the peril of the TRA's proceeding with XO's *Petition* to the extent it seeks a declaration based upon state law. If the D C. Circuit issues its mandate and the FCC's unbundling rules relating to UNEs are vacated, the FCC will be required to adopt new rules, which the TRA would be duty-bound to follow. Even in the interim, the TRA lacks an complete record to decide the issues that the D.C. Circuit held must be considered as part of any impairment analysis. In the event *certiorari* is sought and granted by the Supreme Court and a stay of the D.C Circuit's mandate is issued (which is merely conjecture at this point), the TRA would have to adhere to the FCC's rules, and no need would exist for the TRA to rely upon state law in reaching its unbundling decision. However, until the status of the FCC's rules is resolved, the TRA cannot make any impairment findings, particularly given that further proceedings in Docket Nos. 03-00491, 03-00526, 03-00527 have been stayed.

XO's state law arguments are an ill-conceived attempt to make an end-run around federal law, and XO's reliance upon federal law to obtain the relief it seeks fares no better. For example, even though BellSouth may be required to provide access to local switching, unbundled dedicated transport, unbundled high capacity loops and dark fiber under Section 271 of the 1996 Act, the TRA has no authority to establish rates for network elements offered pursuant to Section 271.

The 1996 Act only gives state commissions authority to establish rates for solely those network elements that are required to be unbundled pursuant to Section 251 of

the 1996 Act.[13] Section 252(d)(1) specifically authorizes state commissions to "determin[e]" rates for unbundled network elements for "purposes of subsection (c)(3) of" Section 251. By contrast, the 1996 Act gives state commissions no pricing authority over network elements offered pursuant to Section 271.

A checklist item required under Section 271 that does not satisfy the unbundling requirements of under Section 251 is subject to the pricing standards of Sections 201(b) and 202(a), not Section 252.[14] Numerous cases hold that claims based on Sections 201(b) and 202(a) are within the jurisdiction of the FCC, not the state public service commissions. *See, e.g., In Re: Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir 1987) (Section 201(b) speaks in terms of justness and reasonableness, which are determinations that "Congress has placed squarely in the hands of the [FCC]") (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997); *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir 1996) (Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory").

Moreover, the FCC has held that the determination of "whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact specific inquiry" that the FCC will undertake.[15] Because the FCC

[13] See 47 U S C § 252(d)
[14] Triennial Review Order ¶ 662
[15] Triennial Review Order ¶ 664

has held that it will "undertake" review of whether the just and reasonable pricing standard has been satisfied, XO cannot explain how the TRA can lawfully have the authority to do so.

Even assuming the TRA had the authority to set BellSouth's rates for UNEs under Section 271 (which is not the case), those rates cannot lawfully be set at TELRIC, as XO urges.[16] The FCC considered and rejected the possibility that TELRIC should be used to establish rates for checklist items provided under Section 271. The FCC could not have been more clear that TELRIC "only applies for the purposes of implementation of section 251(c)(3) – meaning only where there has been a finding of impairment with regard to a given network element."[17] According to the FCC, "pricing pursuant to section 252 [i.e., TELRIC] does not apply to network elements that are not required to be unbundled ...."[18]

The FCC also rejected the use of TELRIC pricing for Section 271 elements that are not required to be unbundled in its Third Report and Order, *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996.*[19] In that case, the FCC noted that when

> a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. ... Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.[20]

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[16] See XO Petition at p 4
[17] Triennial Review Order ¶ 657
[18] Triennial Review Order ¶ 661
[19] CC Docket No 96-98, 15 FCC Rcd 3696 (1999)
[20] Id ¶ 473

XO apparently overlooked this language as well as the passages from the *Triennial Review Order* referenced above in arguing that the TRA can require BellSouth to continue offering local switching, dedicated transport, high capacity loops and dark fiber at TELRIC rates pursuant to Section 271.

XO's *Petition* seeks to create a crisis that does not exist. BellSouth has explicitly stated that it will not unilaterally cease providing service to XO or breach its existing Interconnection Agreement. BellSouth will not disconnect service or take unilateral action even though the law has changed and the rates applicable to certain services have changed. XO's filing of this *Petition* despite such assurances and its references to state and federal law suggest that XO is seeking broader relief to which it is not legally entitled. The issues raised in XO's petition relating to an orderly transition in the event the D.C. Circuit's mandate takes effect on June 16, 2004 are not going to go away. Accordingly, the Authority should consider holding XO's Petition in abeyance and consolidating appropriate issues in a single proceeding, which would allow the Commission to resolve such issues for the industry as a whole, rather

than on a piecemeal basis, at such time as the TRA receives further guidance from the D.C. Circuit Court of Appeals or from the FCC.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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EXHIBIT
A

BELLSOUTH

BellSouth Interconnection Services
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404-927-7503
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May 10, 2004

Ms. Dana Shaffer
Vice President, Regulatory Counsel
XO 105 Molloy Street
Suite 300
Nashville, Tennessee 37201

Dear Ms Shaffer:

This is in response to your letter dated May 6, 2004, regarding Carrier Notification letter SN91084063 dated April 22, 2004, announcing BellSouth's offer of a transition from high-capacity loops, interoffice channels and dark fiber Unbundled Network Elements (UNE) to tariffed offerings of BellSouth or offerings available from others. I am sorry that you misunderstood BellSouth's letter regarding its actions that will take place after the D.C. Circuit Court's vacatur becomes effective. Nowhere in BellSouth's letter is there any discussion or indication that BellSouth will unilaterally breach the Interconnection Agreement and it is not BellSouth's intent to do so.

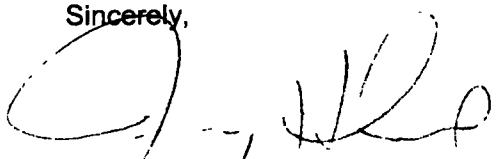
While BellSouth appreciates XO taking the time to express its position regarding the Incumbent Local Exchange Carrier's (ILEC's) obligation to provide high capacity dedicated transport and high capacity loops at UNE pricing once the vacatur becomes effective, BellSouth respectfully disagrees with XO's position. The D.C Circuit Court's Opinion explicitly vacated the Federal Communications Commission's (FCC) national findings of impairment with respect to high capacity dedicated transport and high capacity loops such that these elements are no longer required to be provided at UNE pricing. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Telecommunications Act to offer these elements as UNEs. As stated previously, BellSouth recognizes its obligations under existing interconnection agreements, but will pursue the legal and regulatory options available to it once the vacatur becomes effective. Furthermore, although ILECs presumably will retain an obligation to offer high capacity dedicated transport and high capacity loops pursuant to Section 271 of the Telecommunications Act, such offerings will not be subject to UNE Total Element Long-Run Incremental Cost (TELRIC)-based pricing.

BellSouth's UNE transport transition offering in Carrier Notification Letter SN91084063 is in response to FCC Chairman Powell's call for carriers to enter into commercial negotiations. To provide stability for CLECs, BellSouth is offering a transition plan for CLECs' continued access to high capacity dedicated transport and high capacity loops during the transition period in hopes that its CLEC customers will consider BellSouth as their provider of these special access services.

BellSouth looks forward to the opportunity to successfully negotiate an agreement that will create a viable long-term service arrangement with XO.

Please feel free to call me if there are additional questions or concerns.

Sincerely,



Jerry Hendrix
Assistant Vice President
Interconnection Services

EXHIBIT
B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1012 *et al.*

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

Declaration of Keith O. Cowan and Jerry D. Hendrix

1. I am Keith O. Cowan. I am employed by BellSouth as its President-Interconnection Services. In this position, I have responsibility for BellSouth's services to wholesale customers, including competitive local exchange carriers ("CLECs").

2. I am Jerry D. Hendrix. I am employed by BellSouth as Assistant Vice President-Interconnection Marketing in the Interconnection Services organization. I have been connected to the Interconnection Services organization since the passage of the Telecommunications Act of 1996 (the "Act"). During that time, I have had experience in a variety of roles related to our wholesale operations, including sales, product development, contract negotiation, pricing, and testifying before public service commissions.

3. The purpose of this Declaration is to provide information about BellSouth's actions if this Court's mandate issues. Specifically, it explains that:

(a) there will be no service disruption to CLECs as a result of the mandate's issuance;

(b) during the eight years of FCC rule uncertainty, any changes arising out of regulatory or judicial determinations have been handled successfully, and changes necessitated by this mandate will be no different;

(c) BellSouth has an attractive commercial offer for CLECs that desire commercial certainty.

4. No service to CLEC customers will be terminated by BellSouth because of issuance of the Court's mandate. As described in further detail below, after the mandate issues, BellSouth will continue to provide an equivalent service to wholesale customers that currently obtain mass market switching, high-capacity loops and transport, and dark fiber from BellSouth as unbundled network elements, assuming they wish to continue receiving such service.

5. BellSouth has explained the actions that it will take through dissemination of a Carrier Notification Letter (Attachment 1) and a press release (Attachment 2) to all CLECs in its service territory. The notification letter provides, in pertinent part: "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." The press release affirms that statement, as does this Declaration.

6. Since passage of the Act, there has been substantial litigation and often considerable uncertainty surrounding the rules for unbundled network elements. But BellSouth and other members of the telecommunications industry have successfully managed the changes resulting from judicial decisions and the FCC's promulgation of new UNE rules. For example, the FCC in 1999 essentially eliminated incumbents' obligation to unbundle operator services and directory assistance, which it had required incumbents to unbundle in its original UNE list, established in 1996. Nonetheless, BellSouth continued to provide operator service and directory assistance service to CLECs that desired to obtain it from BellSouth, at "just and reasonable" rates. Similarly, in the *Triennial Review Order*, the FCC eliminated incumbents' obligation to unbundle circuit switching for enterprise customers (subject to conditions that BellSouth satisfied), and CLECs that desired that service have continued to receive it from BellSouth. In every case, the industry has found an orderly legal process available to successfully manage the changes, and customer service was not disrupted. These same orderly processes are still available, and if necessary will be used by BellSouth to effect any changes to contracts or requests for relief that are occasioned by the issuance of the mandate. Provided our CLEC customers

demonstrate the good faith that has characterized BellSouth's previous responses to change, customer service will be unaffected by the issuance of the mandate.

7. BellSouth has attractive commercial offers for CLEC customers that prefer the certainty of a commercial arrangement. For customers that currently purchase the unbundled network element platform (UNE-P), BellSouth offers an equivalent, replacement service that permits existing customers to continue their current service without any price increase for the remainder of 2004, and with a gradual increase to a market-based rate over the remainder of the offer's 42 month term. For customers that desire high-capacity dedicated transport, loops, and dark fiber, BellSouth offers a transition plan from the current UNE service to other BellSouth regulated offerings or to other alternative facilities. We have executed eight commercial agreements for the UNE-P replacement service, and have entered into two separate transition agreements regarding high capacity transport and high capacity loops.

8. Two mischaracterizations of the new equivalent replacement offer also require correction. (*See Motion of CLEC Petitioners and Intervenors, Exhibit A-Declaration of AT&T, p. 27, ¶ 61, and Exhibit D-Declaration of MCI, p.8, ¶ 15).* First, neither the new equivalent nor the existing UNE-P is comparable to BellSouth's basic residential retail service. A CLEC customer purchasing today's UNE-P or tomorrow's

equivalent service receives all the features that are part of BellSouth's highest premium residential retail service, including all switch features for caller ID, call waiting, and similar services, and in addition receives termination of calls to all points within the Local Access and Transport Area (LATA) in which the end-user customer's service is located. None of these premium features is part of BellSouth's basic residential retail service, which renders misleading the attempted comparison and accompanying anti-competitive allegations of AT&T and MCI. (*see id.*). The BellSouth premium residential retail service that compares most closely with UNE-P and the new equivalent service is uniformly priced above the rate for each wholesale service. Even that comparison shortchanges the CLECs' revenue opportunity, however, because subscription to UNE-P or the new equivalent service permits CLECs to collect wholesale revenue from long distance carriers terminating calls over the service. Finally, of course, every retail residential telecommunications service of BellSouth can be purchased by wholesale customers for less than the retail price because of the wholesale discount required by the Act and prescribed by state public service commissions.

9. In addition, the new offer of service equivalent to the UNE-P in Georgia is priced based on the most recent Georgia Public Service Commission rates that have not been invalidated by the courts. The reference in at least one filing (*see AT&T Declaration, pp.27-28, ¶¶62-63*) to a "Georgia exception" (AT&T's pejorative phrase for BellSouth's

proposed use of the most recent Georgia PSC-adopted rates not determined to be unlawful) ignores a federal district court's recent holding that the Georgia PSC acted unlawfully when it set new rates in 2003. The court's determination that the Georgia PSC acted unlawfully is final, although litigation continues over the specific remedy imposed by the district court. Thus, Georgia is not an exception; it fits the proposal's discipline of using the latest rates not found unlawful.

This concludes the Declaration.

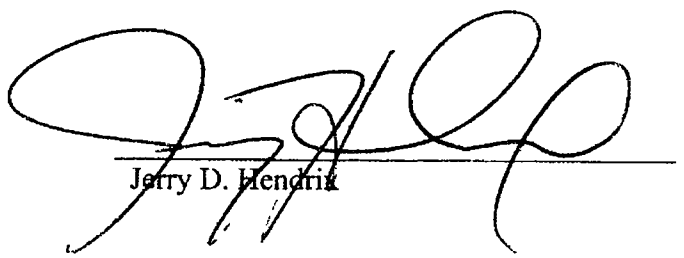
I, Keith O. Cowan, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed May 28, 2004

Keith O. Cowan

I, Jerry D. Hendrix, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed May 28, 2004



Jerry D. Hendrix

ATTACHMENT 1

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

ATTACHMENT 2

BellSouth Confirms To Wholesale Customers That Services Will Continue Even As Rules Change

For Immediate Release:

May 26, 2004

ATLANTA -- BellSouth (NYSE: BLS) today confirmed that there would be no disruption of service if current rules on wholesale leasing of BellSouth unbundled network elements (UNEs) are vacated next month.

Under a District of Columbia Circuit Court of Appeals order due to go into effect on June 16, BellSouth will no longer be required to lease certain portions of its networks to its wholesale customers.

In a letter to its customers on May 24, BellSouth pledged to take no unilateral action to disconnect service to its wholesale customers as a result of the court's vacatur. (http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91084106.pdf)

To ensure a smooth and fair transition to the new market environment, BellSouth will use established legal and regulatory processes to implement the D.C. Circuit Court's decision.

"We are committed to going through the appropriate process," said Keith Cowan, President of BellSouth Interconnection Services. "This is not a new process. The process has been successfully utilized multiple times since the passage of the Act when the FCC previously removed network elements from the list."

"In those cases, no wholesale customers lost service as a result of the elements' removal from interconnection agreements," Cowan explained. "For example, switching for enterprise customers in certain large markets was previously removed from the mandated list. Over a hundred of BellSouth's wholesale customers entered into commercial agreements for market priced switching for enterprise end user customers. The transition from the regulated environment to the competitive environment was smooth with complete service continuity."

"In addition, BellSouth will continue to negotiate commercial agreements with all interested wholesale customers," said Cowan. "We have posted an attractive proposal on our website that offers Competitive Local Exchange Carriers (CLECs) a DSO wholesale local voice platform service to replace the current unbundled switching arrangement with no price increase through the remainder of 2004."

"We have already signed seven commercial agreements and believe we can achieve additional commercial agreements, especially if we are in a position where neither side has a regulatory advantage in the negotiations," he added. "These negotiations must be done in good faith. We pledge to continue to do that."

A transition plan has also been proposed to transfer wholesale customers from the current arrangement with UNE high-capacity dedicated transport, loops, and dark fiber, currently purchased under the competitor's government-mandated interconnection agreement, to BellSouth tariffed and regulated offerings or to other alternative facilities.

BellSouth's approach will allow all CLECs acting in good faith to continue uninterrupted service to their customers during the transition to a changed regulatory environment.

"BellSouth is committed to continue providing quality wholesale service and urges its wholesale customers to consider the proposals we have made," said Cowan.

# # #

For more information contact:

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(404) 829-8741

About BellSouth Corporation

BellSouth Corporation is a Fortune 100 communications company headquartered in Atlanta, Georgia, and a parent company of Cingular Wireless, the nation's second largest wireless voice and data provider.

Backed by award winning customer service, BellSouth offers the most comprehensive and innovative package of voice and data services available in the market. Through BellSouth Answers[SM], residential and small business customers can bundle their local and long distance service with dial up and high speed DSL Internet access, satellite television and Cingular® Wireless service. For businesses, BellSouth provides secure, reliable local and long distance voice and data networking solutions. BellSouth also offers online and directory advertising through BellSouth® RealPages.com[SM] and The Real Yellow Pages®.

More information about BellSouth can be found at http://www.bellsouth.com.

NOTE: For more information about BellSouth, visit the BellSouth Web page at http://www.bellsouth.com.

A list of BellSouth Media Relations Contacts **is available in the** Corporate Information Center.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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

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