BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 8, 2004

IN RE:	)	
	)	
PETITION OF XO TENNESSEE, INC. FOR	)	**DOCKET NO.**
DECLARATORY RULING REQUIRING	)	**04-00158**
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
TO HONOR EXISTING INTERCONNECTION	)	
AGREEMENTS	)	

ORDER DISMISSING PETITION FOR DECLARATORY ORDER WITHOUT PREJUDICE

This matter came before Chairman Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 7, 2004 upon the *Petition for Declaratory Order* ("*Petition*") filed by XO Tennessee, Inc. ("XO") on May 21, 2004. After careful consideration of the record and the statements made by the parties during the Authority Conference, the panel voted unanimously to dismiss the *Petition* without prejudice. In addition, as explained below, the panel voted unanimously to dismiss the *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* as moot and to require BellSouth Telecommunications, Inc. ("BellSouth") to file with the Authority any notice or copy of any document filed in any venue other than the TRA that concerns a change in any of the terms of its interconnection agreement.

BACKGROUND

On November 4, 1999, BellSouth and XO entered into an interconnection agreement ("Agreement") which was approved by the Authority at a regularly scheduled Authority Conference on March 28, 2000.[1] The Agreement expired on November 4, 2002.[2] On April 10, 2003, BellSouth filed an amendment to the Agreement extending its term to December 31, 2003, which was approved by the Authority on July 7, 2003.[3] On April 20, 2004, BellSouth filed a *Petition for Approval of the Standalone Interconnection Agreement Negotiated Between BellSouth Telecommunications, Inc and XO Tennessee, Inc. Pursuant to the Telecommunications Act of 1996,* in which the parties agreed to operate under the rates, terms and conditions of the expired Agreement until the parties executed a new interconnection agreement.[4]

On March 2, 2004, the Court of Appeals for the District of Columbia ("D.C. Circuit") vacated and remanded portions of the Triennial Review Order ("TRO") in which the Federal Communications Commission ("FCC") established unbundling requirements for local switching, transport and other unbundled network elements ("UNEs").[5] The D.C. Circuit temporarily

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[1] *See In re Petition of NEXTLINK Tennessee, L L C for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc* , Docket No. 98-00123, *Order Denying BellSouth's Motion to Reject Certain Provisions of Interconnection Agreement and Approving Interconnection Agreement, as Amended* (August 29, 2000)

[2] Although the Agreement had expired, the parties continued to file amendments to its terms *See, e g , In re Petition for Approval of Amendment to Interconnection Agreement Between BellSouth Telecommunications, Inc and XO Tennessee, Inc* , Docket No 03-00099, *Order Approving Ninth Amendment to Interconnection Agreement* (May 5, 2003)

[3] *See In re Petition for Approval of Amendments to Interconnection Agreement Between BellSouth Telecommunications, Inc and XO Tennessee, Inc* , Docket No 03-00274, *Order Approving Tenth Set of Amendments to Interconnection Agreement*, (August 15, 2003)

[4] *See In re Petition for Approval of the Standalone Interconnection Between BellSouth Telecommunications, Inc and XO Tennessee, Inc* , Docket No 04-00119, *Petition for Approval of the Standalone Interconnection Agreement Negotiated Between BellSouth Telecommunications, Inc and XO Tennessee, Inc Pursuant to the Telecommunications Act of 1996*, p 1 (April 20, 2004)

[5] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 01-338, 96-98, 98-147 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 FCC Rcd 16978 (2003) ("Triennial Review Order"), aff'd in part, remanded in part, vacated in part, *United States Telecom Ass'n v FCC*, 359 F 3d 554 (D C Cir 2004) ("USTA II").

stayed its vacatur for sixty (60) days and, on April 13, 2004, granted an extension of the stay until June 15, 2004.

In its *Petition*, XO asserted that after the D.C. Circuit's decision, BellSouth notified XO that BellSouth's obligation to provide UNEs had been eliminated by the Court's decision and that those UNEs would become unavailable to XO after the Court's order became effective.[6] XO also alleged that BellSouth had not represented that it would: (1) continue to honor its obligations to provide UNEs pursuant to Section 251 and 271 of the Act;[7] (2) continue to honor its obligations under its existing interconnection agreements and its Statement of Generally Available Terms ("SGAT"); (3) seek to have those interconnection agreements declared *void ab initio*; or (4) amend its interconnection agreements and SGAT to eliminate switching, transport and high capacity loop UNEs.[8] XO argued that BellSouth's statements in some matters and silence in others in response to the D.C. Circuit's decision created uncertainty with respect to the continued availability of local switching, transport, high capacity loops and dark fiber UNEs.[9] XO asserted that an immediate elimination of those UNEs at TRA-prescribed rates would have a devastating impact on BellSouth's Tennessee local exchange competitors and, more importantly, on end user customers.[10] XO asked the TRA to require BellSouth to maintain the status quo until the federal dispute over UNEs was resolved or until the TRA conducted proceedings to determine whether, in the absence of federal rules, BellSouth should be required to provide UNEs on some other basis.[11] Therefore, XO requested that the TRA issue a declaratory ruling ordering BellSouth to continue to honor all of its unbundling obligations as set forth in existing interconnection agreements and in BellSouth's SGAT, including the provisioning of unbundled

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[6] *Petition for Declaratory Order*, p 2 (May 21, 2004)
[7] 47 U S C § 251 and 47 U S C § 271
[8] *Petition for a Declaratory Order*, p 3 (May 21, 2004)
[9] *Id*
[10] *Id*
[11] *Id* at 6

local switching, dedicated transport and high capacity loops at Section 252(d)[12] compliant rates, until final federal rules are promulgated or until the TRA can undertake a proceeding to determine the impact of the D.C. Circuit's decision on BellSouth's existing obligations to provide those UNEs.[13]

BellSouth filed *BellSouth Telecommunications, Inc 's Response to Petition for Declaratory Order* ("*Response*") on June 3, 2004, in which it maintained that XO had relied on the false premise that BellSouth intended or had threatened to unilaterally discontinue its offering of local switching, transport, high capacity loops and dark fiber UNEs to XO, to engage in drastic self help remedies, and to refuse to process any new XO orders for UNEs after June 15, 2004.[14] BellSouth stated that although it issued two Carrier Notification Letters inviting Competing Local Exchange Carriers ("CLECs") to enter into discussions with BellSouth, neither letter threatened or suggested that BellSouth intended to unilaterally discontinue the offering of UNEs at the rates, terms and conditions contained in the Agreement.[15] BellSouth also responded that it issued a letter to XO on May 10, 2004 in which it pointed out that: (1) it was not BellSouth's intent to unilaterally breach the Agreement; (2) it recognized its obligations under the existing Agreement; and (3) BellSouth would pursue the legal and regulatory options available to it once the vacatur of the rules became effective.[16] Finally, in its *Response*, BellSouth stated, "BellSouth will honor its existing Interconnection Agreements until such time as established legal processes relieve BellSouth of that obligation" which may occur through the "change of law" provisions in the interconnection agreements, through a generic proceeding held by the appropriate state or federal agencies, or by a proceeding filed in the appropriate court.[17]

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[12] 47 U.S C § 252(d).
[13] *Petition for a Declaratory Order*, p 4 (May 21, 2004)
[14] *BellSouth Telecommunications, Inc 's Response to Petition for Declaratory Order*, p 1 (June 3, 2004)
[15] *Id* at 1-3
[16] *Id* at 3-4 and Exhibit A
[17] *Id* at 5.

BellSouth asserted that it had "stated clearly and without exception that it will not act unilaterally to modify or change the existing agreements."[18] BellSouth asked the Authority to "consider holding the Petition in abeyance and consolidating appropriate issues in a single proceeding, which would allow the Commission [sic] 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."[19]

On June 3, 2004, the Competitive Carriers of the South, Inc. ("CompSouth") filed its *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* ("*Petition to Intervene*"). In its *Petition to Intervene*, CompSouth stated its support for XO's *Petition* and asserted that: (1) BellSouth's recent actions and statements have created confusion; (2) BellSouth was unwilling to commit to maintaining the *status quo* regarding rates, terms and conditions applicable to CompSouth members agreements and honor its contractual obligations and seek amendments to existing interconnection agreements; and (3) CLECs must have certainty that the rates, terms and conditions contained in interconnection agreements would remain binding obligations after June 15, 2004.[20] As a result, CompSouth claimed that its members' legal rights, duties, privileges, immunities, or other legal interests or responsibilities might be affected or determined by the outcome of this proceeding and requested the Authority to grant its *Petition to Intervene*.[21]

JUNE 7, 2004 AUTHORITY CONFERENCE

At the June 7, 2004 Authority Conference, BellSouth asserted that there would be no disconnection of customers as a result of the D.C. Circuit's vacatur of portions of the TRO and

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[18] *Id*
[19] *Id* at 14-15
[20] *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*, p 13 (June 3, 2004)
[21] *Id* at 2

that any changes to its agreements with the CLECs would be made through an established process.[22] BellSouth further stated that it had not determined what that process would be, and that it could be through the change of law provisions in its interconnection agreements, through a generic proceeding before a state or federal body, or through a court proceeding.[23] BellSouth stated that it would not take unilateral action and, therefore, would provide notice to the CLECs.[24] XO responded that although BellSouth had taken steps within the past few weeks to reassure the CLECs, BellSouth should be required to involve the Authority in the process it chooses or, at a minimum, be required to inform the Authority of any established process BellSouth chooses before it takes any action.[25]

As XO stated in its *Petition*, "[i]f there are no further extensions and the stay expires, the majority of the FCC rules governing the unbundling requirements under Section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ... will no longer exist for local switching, transport and other UNEs."[26] The panel agreed that the vacatur of the TRO and elimination of rules governing unbundling requirements would only occur if the stay expired on June 15, 2004 and the mandate of the D.C. Circuit issued. However, until the D.C. Circuit's stay has expired, no change of law will have occurred. That stay may or may not expire on June 15, 2004. Therefore, the panel could not determine whether or not the vacatur of the TRO would occur, whether or not the unbundling requirements would cease to exist, or whether or not a change of law would occur until after that date. As a result, the panel found that the *Petition* filed by XO was premature and should be dismissed without prejudice.[27] As a result of the dismissal, the panel further found CompSouth's *Petition for Intervention* was moot and

[22] Transcript of Authority Conference, p 38 (June 7, 2004)
[23] *Id*, p 39 (June 7, 2004)
[24] *Id*, p 60 (June 7, 2004)
[25] *Id*, p 43-44 (June 7, 2004)
[26] *Petition for a Declaratory Order*, pp 1-2 (May 21, 2004) (Emphasis added)
[27] As a result of this finding, the panel did not reach the issue of whether the TRA has authority under state law to require BellSouth to continue to provide existing UNEs, as asserted by XO and disputed by BellSouth

should be dismissed. However, the panel found that XO's request that the Authority be notified of any established process Bellsouth chooses to implement changes if the stay expires was reasonable, was not unduly burdensome, and should be granted. Therefore, the panel voted unanimously to require BellSouth to file a notice or a copy of any document filed in any venue other than the TRA that concerns a change in any of the terms of its interconnection agreement.

IT IS THEREFORE ORDERED THAT:

1. The *Petition for Declaratory Order* filed by XO Tennessee, Inc. is dismissed without prejudice;

2. The *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* is dismissed as moot; and

3. BellSouth Telecommunications, Inc. shall file with the Authority any notice or copy of any document filed in any venue other than the TRA that concerns a change in any of the terms of its interconnection agreement.

Deborah Taylor Tate, Chairman

Sara Kyle, Director

Ron Jones, Director